87-1611

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE CITY OF HOUSTON, ET AL.,
Petitioners

v.

MOSES LEROY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT J. COLLINS
Senior Assistant City Attorney

JOHN E. FISHER
Senior Assistant City Attorney

P. O. Box 1562
Houston, Texas 77251
(713) 247-2000

Attorneys for Petitioners

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously affirm an award of attorney's fees for unsuccessful Voting Rights Act litigation absent competent evidence that the Plaintiffs were a catalyst to the Defendants in achieving single-member districts?

2. Did the Court of Appeals use the correct legal standard for awarding attorney's fees for "coverage" litigation under § 5 of the Voting Rights Act when the Justice Department was also a party to that litigation?

3. Did the Court of Appeals, after finding an abuse of discretion in the award of attorney's fees, fail to correct it?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Because there are both nominal and real parties in interest in this litigation, they are so divided to reflect more accurately their status under the Final Judgment in the District Court.

NOMINAL PARTIES IN INTEREST

A. Plaintiffs below and Respondents here:

Moses Leroy
Mickey Leland
Lawrence L. Pope
Joe Perez
Joe Padilla
Hector Garcia
Don Horn
Greater Houston Civic Council of Organizations
Harris County Women's Political Caucus
Political Association of Spanish Speaking Organizations

B. Defendants below individually and in their official capacities and Petitioners here:

Frank Mann	Member of the At-Large City Council
Johnny Goyen	Member of the At-Large City Council
Larry McKaskle	Member of the At-Large City Council
Judson Robinson, Jr.	Member of the At-Large City Council
Louis Macey	Member of the At-Large City Council
Homer Ford (now deceased)	Member of the At-Large City Council
Frank Mancuso	Member of the At-Large City Council
James Westmoreland	Member of the At-Large City Council
Jim McConn (later elected Mayor)	Member of the At-Large City Council
Anna Russell	City Secretary

REAL PARTIES IN INTEREST

A. Defendant below and Petitioner here:

The City of Houston, Texas

B. Attorneys awarded fees below and Respondents and/or counsel for Respondents here:

George Korbel	of San Antonio, Texas
Jesse Botello	of San Antonio, Texas
L.A. ("Al") Greene	of Houston, Texas
Frumencio Reyes	of Houston, Texas
Juan Aldape	of Houston, Texas
Craig Washington	of Houston, Texas
Sidney Bracquet	of Houston, Texas
David Boddie	of Houston, Texas
Regina Temple	of Houston, Texas
Larry Evans	of Houston, Texas
Hogan & Hartson	of Washington, D.C.

C. Expert witnesses awarded fees in the Final Judgment of the District Court:

Dr. Chandler Davidson	of Houston, Texas
Dr. Richard Murray	of Houston, Texas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OPINIONS BELOW

The District Court's Memorandum Opinion and Order, dated August 1, 1986, granting attorney's fees and costs is published as *Leroy v. City of Houston*, 648 F.Supp. 537 (S.D. Tex. 1986). The Final Judgment of the same date is unpublished. Both are reprinted in the Appendix.

The Court of Appeals' opinion, dated November 12, 1987, is published as *Leroy v. City of Houston*, 831 F.2d 576 (5th Cir. 1987). The Court's order denying the petition for rehearing is dated December 28, 1987, and is reported at 836 F.2d 1346. Both are reprinted in the Appendix.

OTHER REFERENCES

The parties will be referenced by their status before the District Court as Plaintiffs and Defendants.

References to the opinions below will be to the published versions with cross-reference to the Appendix. References to the "Transcript of Proceedings" (the ten-day hearing on attorneys' fees in April-May, 1985) will be cited as "Tr." with the volume as a roman numeral and the page reference in arabic numbers, as in "Tr. II-22-25." Plaintiffs' exhibits are referred to as "PX" with the exhibit number. Defendants' exhibits are referred to as "DX" with the exhibit number.

STATEMENT OF JURISDICTION

The Court of Appeals' opinion was issued on November 12, 1987, and rehearing was denied on December 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) by the timely filing of this Petition for Writ of Certiorari.

APPLICABLE STATUTORY PROVISIONS

42 U.S.C. § 1973c:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention

of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court."

42 U.S.C. § 1973l:

"(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 1973g of this title shall have jurisdiction to issue any declaratory judgment pursuant to section 1973b or section 1973c of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapters I-A to I-C of this chapter or any action of any Federal officer or employee pursuant hereto."

"(e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This is the appeal of an award of attorneys' fees for Voting Rights Act litigation. However, it is not a conventional attorneys' fees case. The amount that the District Court awarded, $1,025,232.00 in fees and expenses to the Plaintiffs' attorneys, *Leroy v. City of Houston*, 648 F.Supp. 537, 578 (S.D. Tex. 1986), App. A, p. 93a), dwarfs the amounts commonly granted in Voting Rights cases. Secondly, fees were granted for legal work in three separate cases because the work in these cases acted as a catalyst to the Justice Department. Although these three cases were never formally consolidated, the District Court elected to consider them as part

of a continuous effort to force the City of Houston to elect its City Council from single-member districts. *Leroy v. City of Houston,* 584 F.Supp. 653 (S.D. Tex. 1984); *Leroy v. City of Houston,* 648 F.Supp. at 544, 550, 556 and fn. 18 (App. A, pp. 14a, 27a, 42a). The Court of Appeals affirmed approximately 70% of the amount awarded. *Leroy v. City of Houston,* 831 F.2d 576, 586 (5th Cir. 1987) (App. C, p. 120a).

Until the mid-1950's the City of Houston had a ward system with the election of its City Council from residency districts. The City then changed to an at-large system as a reform measure. (648 F.Supp. at 548; App. A, p. 23a; Tr. I-139-40.) In the early 1970's minority representatives in the State Legislature attempted without success to pass legislation that would require the City to change the method of election of City Council members to a single-member district scheme. (648 F.Supp. at 548; App. A, p. 24a.) The effort to secure single-member districts then turned to litigation. In 1973, a coalition of plaintiffs filed a constitutional challenge to the at-large system styled *Greater Houston Civic Council, Inc., et al. v. Mann, et al.,* Civil Action H-73-1650 (*"Mann"*). (648 F.Supp. at 549; App. A, p. 25a.) During the pendency of the *Mann* case and after the Voting Rights Act had been extended to Texas, the Plaintiffs filed a second case, *Moses Leroy v. City of Houston,* Civil Action No. H-75-1731 (*"Leroy I"*), challenging certain annexations to the City under § 5 of the Voting Rights Act (42 U.S.C. § 1973c) as well as demanding an order that the City Council be elected from single-member districts. (648 F.Supp. at 549-550; App. A, pp. 25a-27a; DX. 9.) A three-judge Court denied Plaintiffs' request for an injunction and later denied their request for attorneys' fees

in *Leroy I.* (DX. 4; 648 F.Supp. at 550, fn. 18; App. A, p. 27a.)

In the fall of 1976 the *Mann* case was tried and the Defendants prevailed. *Greater Houston Civic Council v. Mann,* 440 F.Supp. 696 (S.D. Tex. 1977). The Plaintiffs appealed to the Court of Appeals and the Justice Department filed an *amicus curiae* brief in support of the Plaintiffs' position. (648 F.Supp. at 549; App. A, p. 25a.) The pending appeal became moot in 1979 when, as a result of an objection to certain additional annexations from the Justice Department under § 5 of the Voting Rights Act, the City adopted a mixed City Council scheme of nine members elected from single-member districts and five elected at-large. (648 F.Supp. at 549-550; App. A, pp. 25a-27a.)

While *Mann* was still pending on appeal, the plaintiffs filed a third suit in November 1978 styled also *Moses Leroy, et al. v. City of Houston,* Civil Action No. H-78-2174 (*"Leroy II"*), under § 5 of the Voting Rights Act (42 U.S.C. § 1973c). In addition, *Leroy II* demanded the Court order the City to adopt a single-member district form of government. *Leroy II* concerned election changes resulting from annexations in the Clear Lake City area and other areas. The Plaintiffs alleged that the City had called an election without preclearance from the Justice Department. (648 F.Supp. at 550; App. A, p. 28a.) In December 1978, a separate action, *United States v. City of Houston, et al.,* Civil Action No. H-78-2407, was filed by the Justice Department. Upon the latter's motion, H-78-2407 was promptly consolidated with *Leroy II.* (See the respective docket sheets.) Plaintiffs' request for a temporary injunction was denied. (*Id.*)

Prior to *Leroy II*, the Justice Department precleared the annexation of the less-populous part of the Clear Lake area by letter of October 3, 1977, but warned of an objection if the more populated portions of the area were later annexed. (DX. 1; 648 F.Supp. at 554; App. A, p. 37a.) The City annexed the remainder of the Clear Lake area and other areas and made its submission to the Justice Department in February 1979. Predictably, on June 11, 1979, the Justice Department found that the City had failed to show that the annexations had no dilutive effect on the voting rights of the minority residents of Houston and objected to the City's implementation of the annexation for voting purposes. (648 F.Supp. at 555; App. A, p. 40a; DX. 14.) After hearing from City officials, the Plaintiffs, and other interested individuals and groups, the Justice Department refused to reconsider its objection by letter of July 18, 1979. (648 F.Supp. at 555-56; App. A, pp. 41a-42a.)

The City Council called an election for August 11, 1979, and placed on the ballot a mixed plan of electing nine members by district and five at-large, along with seven other propositions. On July 19, 1979, the United States and the private Plaintiffs moved for a preliminary injunction in *Leroy II*. A three-judge court enjoined the City from holding an election on any issue except for the precleared nine/five plan. That issue was submitted to the voters who approved the nine/five plan and the Justice Department withdrew its remaining objection. (648 F.Supp. at 550, 556; App. A, pp. 27a, 42a.)

Little of consequence occurred in *Leroy II* until December 1982, when the District Court *sua sponte* raised the issue of attorneys' fees. Defendants moved to exclude

from consideration for attorneys' fees work done in *Leroy I*, the *Mann* case and the administrative proceeding on preclearance before the Justice Department. The District Court denied the motion in April 1984. See *Leroy v. City of Houston*, 584 F.Supp. 653 (S.D. Tex. 1984). After further skirmishes between the parties, including an aborted settlement and an attempted recusal, *In Re City of Houston*, 745 F.2d 925 (5th Cir. 1984), the District Court heard extensive testimony in April-May 1985. Following the filing of a transcript of the testimony and briefing by the parties, the District Court took the matter under advisement. On August 1, 1986, the District Court entered a Memorandum Opinion and Order and a Final Judgment awarding attorneys' fees and expenses to Plaintiffs' counsel. On August 29, 1986, Defendants appealed to the Court of Appeals.

The Court of Appeals held that the Plaintiffs were not entitled to an award of fees for work performed before the Justice Department during its preclearance review or in *Leroy I*. After eliminating the contingency multiplier granted by the District Court and disallowing certain expert witness fees, the Court of Appeals reversed and remanded the case with instructions to enter a judgment in favor of the Plaintiffs in the amount of $693,-805.00 as "a fair, indeed ample award." 831 F.2d at 586; App. C, p. 120a. The Court of Appeals denied a Motion for Rehearing. 836 F.2d 1346; App. D, p. 122a.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE COURT OF APPEALS ERRONEOUSLY AFFIRMED AN AWARD OF ATTORNEY'S FEES FOR UNSUCCESSFUL LITIGATION WITHOUT COMPETENT EVIDENCE THAT THE PLAINTIFFS WERE A CATALYST TO THE DEFENDANTS.

The Court of Appeals denied the Plaintiffs' requested attorneys' fees for work in *Leroy I* and for the work performed during the preclearance review before the Justice Department. Thus, the only questions presented in this Petition are the availability of attorney's fees for the Plaintiffs' participation in their unsuccessful litigation in *Mann* and for their participation, together with the United States Justice Department, in the § 5 litigation in *Leroy II*.

In analyzing the availability of attorney's fees in these latter proceedings, the Court of Appeals applied an erroneous legal standard. The Plaintiffs recovered for the work expended upon the *Mann* litigation without the showing that the litigation was a substantial catalyst and a motivating force in the City's decision to adopt its single-member district form of government. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). The evidence utterly failed to show that the *Mann* litigation caused the Defendants to act and demonstrated at most that the *Mann* litigation was merely useful to the Justice Department in the formulation of an objection under Section 5 to the City's annexations. Such a showing is inadequate, under established law, to entitle a plaintiff to fees as a "prevailing party." *Webb v. Board of Education,* 471 U.S. 234 (1985).

A. The *Mann* Case

The key issue in this appeal is now, and has always been, the Plaintiffs' efforts to recover approximately $384,650.00 in attorney's fees for their losing endeavor in the *Mann* litigation. Two inconsistent reasons were advanced by the Plaintiffs and accepted by the District Court as a basis for the recovery of fees in *Mann*: (i) that *Mann* was a catalyst to the Justice Department and (ii) alternatively, that *Mann* was a catalyst to the City because the City feared a remand and subsequent loss upon retrial of the case. The Court of Appeals correctly rejected the first argument as legal error. *Leroy v. City of Houston,* 831 F.2d at 582-83; App. C, pp. 111a-112a.

However,the Court of Appeals gave inadequate review to the second proposition under the "clearly erroneous" standard of Rule 52. Undeniably, it was *Plaintiffs'* burden to prove that their efforts in *Mann* were a "substantive factor" or "significant catalyst" in forcing the City to accept a mixed district plan in order to be prevailing parties entitled to attorney's fees.

As the District Court noted: "All the parties agree that the immediate cause of the City's changing the method of selecting Council Members was the Department of Justice's objection to the annexations and blocking the bond election." 648 F.Supp. at 557; App. A, p. 44a. It further found: "Without an objection, no remedy of adopting single-member districts would have been discussed." 648 F.Supp. at 554; App. A, p. 38a. The only logical thrust of these findings (and of the District Court's general overview of how the Plaintiffs had galvanized a lethargic Justice Department to act)

is that any catalytic effect of *Mann* was on the *Justice Department*, not the *City*. None of these findings supports a conclusion that fear of a remand in *Mann* had a catalytic effect upon the City's decision to adopt single-member districts, and in fact there was no such evidence.

Nevertheless, the Court of Appeals still accepted as "not clearly erroneous" the District Court's conclusion that *Mann* had a significant connection with municipal redistricting. 831 F.2d at 581; App. C, p. 109a. Unfortunately, the Court of Appeals failed in its duty to evaluate carefully the competency of the evidence used by the District Court to make that alternative finding. The only evidence supporting the District Court's conclusion was the self-serving speculation offered by Plaintiffs and their attorneys. However, factual deductions from mere speculation are not proof. *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1348 (5th Cir. 1985).

The testimony presented by the Plaintiffs regarding what motivated the City was exactly of the same nature and quality as their testimony regarding what motivated the Justice Department. The Court of Appeals correctly denigrated that evidence as "hearsay testimony and speculation regarding Justice Department resources, policies and procedure in this case." 831 F.2d at 580; App. C, p. 106a. While it was error for the District Court to accept such evidence as competent to show the City's motivation, that error was compounded because of the existence of uncontradicted testimony of City officials to the contrary. This is not a case in which the Plaintiffs testified as to their catalytic effect and the Defendants remained mute. Here high ranking City officials came

forward to testify and to subject themselves to cross-examination by the Plaintiffs.

Apparently the District Court rejected the testimony of these City officials solely because of the existence of a contract with the firm of Hamilton & Rabinowitz, Inc., which, in its view, indicated that the City anticipated a retrial of *Mann* (and, by inference, implemented single-member districts to moot that litigation). 648 F.Supp. at 549; App. A, pp. 26a-27a. The District Court therefore observed:

> "The Court was told and heard no evidence to the contrary that the only case outstanding at the time against the City of Houston concerning boundary changes was 73-1650 [*Mann*]. (Tr. Vol. 8, p. 21.) Thus, the Court can only conclude that these expenses were indeed incurred in anticipation of and preparation for a retrial of 73-1650." *Id.*

This finding is clearly erroneous. Other litigation specifically challenging the City's recent annexations as invalid under the Voting Rights Act was also pending—*Marvin Delaney, et al. v. City of Houston, et al.* (DX. 22). Therefore, the District Court's fact-finding that *Mann* was a catalyst in moving the City to single-member districts is so against the clear weight of competent evidence as to be clearly erroneous. *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985); *Merchants National Bank of Mobile v. Dredge General G. L. Gillespie,* 663 F.2d 1338, 1341 (5th Cir. 1981), cert. dism'd 456 U.S. 966 (1982); *Apolskis v. Concord Life Insurance Co.,* 445 F.2d 31, 34 (7th Cir. 1971).

In summary, the Court of Appeals approved the District Court's acceptance of self-serving hearsay and specu-

lation as probative rather than follow settled Fifth Circuit authority that the crucial inquiry in determining catalytic effect is the "chronology of events." Even in the event that *Mann* were reversed, that case would have had to have been retried in a completely different factual setting (principally because of the intervening annexations in 1977 and 1978) and, depending upon the time of remand, under a different statutory standard than that which applied during the initial trial.

In fact, by the time *Mann* was on appeal it was being ignored even by the Plaintiffs. The new battlefield was the Justice Department. Because of the recent annexations, the Plaintiffs had the City "by the throat." 648 F. Supp. at 555; App. A, p. 39a. If the Plaintiffs were confident in early 1979 that *Mann* would be reversed, there would have been no reason for them to mount such a vigorous opposition to the City's § 5 preclearance of the 1977-1978 annexations. (See, *e.g.*, 648 F.Supp. at 555-6; App. A, pp. 43a-44a.)

B. *Leroy II*

By contrast, *Leroy II* was a § 5 enforcement action and, therefore, had as its goal an injunction against the implementation of unprecleared annexations rather than the formulation of a new electoral scheme. Thus, *Leroy II* could not be considered as a catalyst to the City's adoption of single-member districts. Further, it is illogical to suggest, as did the District Court, 648 F.Supp. at 558; App. A, p. 47a, and the Court of Appeals, 831 F.2d at 581; App. C, p. 108a, that the City feared the Plaintiffs' persistent efforts at litigation, for the Plaintiffs had never secured an injunction or achieved any other success in any of their litigation until *after* they were joined by the

Justice Department in *Leroy II*. As stated in *Hennigan v. Ouachita Parish School Board*, 749 F.2d 1148, 1152 (5th Cir. 1985), the "chronology of events" should be carefully considered in order to assess any provocative effect of the Plaintiffs' lawsuit. It is hard to see how six years of *unsuccessful* litigation could have any influence upon the City's adoption of single-member districts, and the Plaintiffs produced no evidence to establish such a nexus.

In fact, the Plaintiffs had little leverage with which to influence the City, while the legal authority and influence of the Justice Department through the preclearance review were significant. The Justice Department's objection under the Voting Rights Act achieved what the Plaintiffs had been constantly seeking without success for six years. Faced with the legal consequences of the Justice Department's objection, the City capitulated within five months of its submission to the Justice Department's § 5 preclearance review.

The Court of Appeals further erred in holding that the Plaintiffs' efforts in filing *Leroy II* had a causal connection with the City's change to single member districts. The merits of a proposed change in an electoral system can never be at issue in a § 5 proceeding. *Perkins v. Matthews*, 400 U.S. 379, 383-386 (1971). Indeed, as the Fifth Circuit had held, participation in the § 5 review process in the Department of Justice can never be considered activity in furtherance of the goal of § 5 litigation, nor can obtaining a new voting procedure be considered the object of § 5 litigation. *Arriola v. Harville*, 781 F.2d 506, 511 (5th Cir. 1986), *cert. denied*, ____U.S.____ (1986).

The Court of Appeals, however, contravened the holding in *Webb v. Board of Education, supra,* and *Arriola* and allowed fees for the work in *Leroy II* because "achieving the procedural goal of preclearance review was expected by the plaintiffs to yield a favorable result before the Justice Department." 831 F.2d at 581; App. C, p. 108a. The Court of Appeals awarded fees despite the lack of any discussion by the District Court as to whether the Plaintiffs could be prevailing parties in *Leroy II* simply because that case resulted in the City's submission of annexations to the Department of Justice. Therefore, the Court of Appeals did not reach this possible contention. 831 F.2d at 581, fn. 7; App. C, p. 107a. Moreover, the Court ignored the holding in *Perkins v. Matthews,* 400 U.S. 379 (1971), rejecting any connection between § 5 enforcement and any subsequent redistricting, and found "no incongruity" because of the "rather unusual situation in this case" where the Plaintiffs had already litigated and lost the issue in *Mann.* 831 F.2d at 581; App. C, p. 108a.

The Court of Appeals relied upon the subjective beliefs and feelings of the Plaintiffs as to the eventual outcome of the Justice Department proceedings to conclude that the § 5 litigation had a catalytic effect upon the City's decision to change to single member districts. However, the Court's decision ignored the required analysis as to the causal relationship between Plaintiffs' litigation and the Defendants' actions and granted attorney's fees simply because the desired result occurred. The Court's new test leads to the anomalous result that attorney's fees are recoverable in § 5 litigation upon the occurrence of two circumstances: first, a favorable outcome to Plaintiffs in the Justice Department's § 5 preclearance review, and second, an

expectation by the Plaintiffs that this favorable result would occur. This formulation is totally at odds with this Court's decisions in *Perkins v. Matthews, supra,* and *Webb v. Board of Education, supra.*

Despite the remarkable new test that the Court of Appeals fashioned for recovery of attorneys' fees in § 5 litigation, the undisputed fact remains that the Justice Department was also a party in *Leroy II.* All that any plaintiff, governmental or private, can obtain in § 5 coverage litigation is an injunction against implementing voting changes without preclearance or a declaratory judgment. This is exactly the relief the Justice Department sought in *Leroy II.* (See DX. 16.) The Court of Appeals entirely failed to evaluate the legal effect of the presence of the Justice Department as an intervenor in *Leroy II* as it related to an award of attorney's fees for acting as "private attorneys general." Thus, *Leroy II,* even assuming the Plaintiffs prevailed, required application of the "special circumstances" test in *Newman v. Piggie Park Enterprise, Inc.,* 390 U.S. 400, 402 (1968).

II.

THE COURT OF APPEALS APPROVED THE DISTRICT COURT'S APPLICATION OF AN ERRONEOUS LEGAL STANDARD TO DETERMINE THE "LODESTAR" FEE DUE THE PLAINTIFFS' ATTORNEYS.

The Court of Appeals reviewed the District Court's determination of the applicable hourly rate of each of the Plaintiffs' attorneys and the amount of hours reportedly expended in this litigation. The Court of Appeals correctly noted that the District Court had "uncritically skewed the lodestar factors in every instance favorably

to the Plaintiffs and against the City." 831 F.2d at 584; App. C, p. 116a.

In the context of the prevailing rate, the Court of Appeals noted that the District Court erroneously based its figures on current rates and current levels of expertise, thus resulting in double compensation for the Plaintiffs' attorneys. Therefore, the Plaintiffs received compensation "based on current rates for work done, for the most part, in the late 1970's and they were permitted to base their current rates on experience and expertise gained since that time," resulting in an excessive average hourly rate (after deduction of the contingency multiplier originally granted by the District Court) of $181.* In fact, a first year lawyer was awarded fees based upon an hourly rate of $150 per hour. 831 F.2d at fn. 14; App. C, p. 117a.

The Court of Appeals recognized that this practice produced a windfall of the type prohibited by *Hensley v. Eckerhart*, 461 U.S. 424 (1985). In addition, the Court noted that the hourly rates awarded were at the

---

* The Court of Appeals' effective fee award of $181.00 per hour is greatly in excess of recent Voting Rights Act rates approved in that circuit and other circuits. E.g., *Jordan v. Allain*, 619 F.Supp. 98 (N.D. Miss. 1985) ($65.00-100.00); *Kirksey v. Danks*, 608 F.Supp. 1448 (S.D. Miss. 1985) ($60.00-100.00); *Flowers v. Wiley*, 675 F.2d 704 (5th Cir. 1982) ($40.00-133.00); *Conner v. Winter*, 519 F.Supp. 1337 (S.D. Miss. 1981) ($35.00-100.00); *Matthews v. LeFlore City Bd. of Election Comm.*, 477 F.Supp. 885 (N.D. Miss. 1979) ($100.00); *Latham v. Chandler*, 406 F.Supp. 754 (N.D. Miss. 1976) ($20.00-40.00); *Campaign for a Progressive Bronx v. Black*, 631 F.Supp. 975 (S.D. N.Y. 1986) ($100.00); *Perez v. Velez*, 629 F. Supp. 734 (S.D. N.Y. 1985) ($100.00-140.00); *Cohen v. Maloney*, 428 F.Supp. 1278 (D. Del. 1977) ($50.00); *Rybicki v. State Bd. of Educ.*, 584 F.Supp. 849 (N.D. Ill. 1984) ($65.00-175.00); *In re Kans. Congressional Dists. Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984) ($75.00); *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976) ($50.00-75.00); *Andrews v. Koch*, 554 F.Supp. 1099 (E.D. N.Y. 1983) ($60.00-100.00).

"high end of the spectrum of current local commercial practice rather than at rates customarily charged by attorneys in civil rights cases." Finally, the Court of Appeals observed that the District Court did not seem to have considered as particularly probative the actual charges of the Plaintiffs' lawyers for comparable services. Nevertheless, the Court of Appeals still refused to find that an average rate of $181 per hour for legal work performed in the early 1970's was clearly erroneous. 831 F.2d at 585; App. C, p. 117a. It refused to recognize that "an attorneys fee award should be only as large as necessary to attract competent counsel." *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986), cited in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, ___U.S.___, 107 S. Ct. 3078, 3089, n. 12.

The Court of Appeals, therefore, allowed the District Court's determination to stand despite the lower court's application of an incorrect legal standard. It is axiomatic that this type of error is not governed by the clearly erroneous rule. Rule 52a does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact or a finding of fact predicated upon a misunderstanding of the governing rule of law. *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984).

If, indeed, the District Court erred by utilizing the wrong legal standard in determining hourly rates and, therefore, produced a windfall of the type prohibited by *Hensley*, the Court of Appeals was not bound by any subsidiary findings made by the District Court in support of its determination of the hourly rates. Nevertheless, the Court of Appeals refused to correct this legal error and apply *Hensley v. Eckerhart*.

The Court of Appeals was equally "troubled by the court's wholesale acceptance of Plaintiffs' time records." Indeed, it found that, based on the record, "such faulty records" should not be accepted absent a reduction in the lodestar. However, while concluding that a reduction should be made for the deficiencies in the time records, the Court of Appeals merely deducted 13% from the *hourly rate* for incomplete records while allowing the time records themselves to stand otherwise uncorrected.

It is the City's position that any reduction resulting from incomplete time records should be deducted from the *hours claimed* rather than from the hourly rate. To reduce an excessive hourly rate because of incomplete time records addresses only half the problem. Thus, if uncorrected, this error will result in a windfall for the Plaintiffs' attorneys. Indeed, from a reading of the Court of Appeals' decision, it is clear that the District Court erred in two respects: first, it applied an erroneous legal standard in determining an appropriate hourly rate, and second, it failed to follow the correct legal standards in reviewing the time records submitted by the Plaintiffs.

The proper approach should have been to set a satisfactory hourly rate and then also to reduce the hours compensated because of inadequate time records. The Court of Appeals' decision inexplicably deducts 13% from the average hourly rate for incomplete time records, while allowing Plaintiffs' recovery for each of their hours claimed at an average of $157 per hour. The application of a reduced hourly rate does little to cure the District Court's additional error in accepting at face value the woefully deficient time records submitted by the Plaintiffs' attorneys in this case and consequently results in an excessive fee. Further, the Court of Appeals' approach

does not encourage other fee applicants to keep adequate time records. The Court should have reduced the hourly rate as well as reducing the number of hours awarded in order to reach a fair result in this case, assuming *arguendo* the Plaintiffs were prevailing parties.

The unfortunate result of this methodology used by the Court of Appeals is to put that Court's stamp of approval on an excessive hourly rate of $181. This rate should have been reduced because it is unreasonably high, not because time records in this particular case happened to have also been inadequate.

CONCLUSION

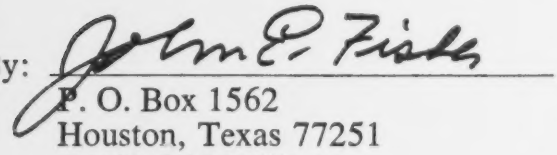
The Court of Appeals' decision as to the liability of the City of Houston for attorney's fees in *Mann* and *Leroy II* conflicts with prior decisions of this Court regarding the award of attorney's fees for unsuccessful catalytic litigation. Moreover, that Court's affirmance of the District Court's grant of attorney's fees based upon deficient time records and accepting a rate of $181 per hour resulted in an unfair windfall for the Plaintiffs' attorneys.

For the foregoing reasons this petition should be granted and a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT J. COLLINS
Senior Assistant City Attorney

JOHN E. FISHER
Senior Assistant City Attorney

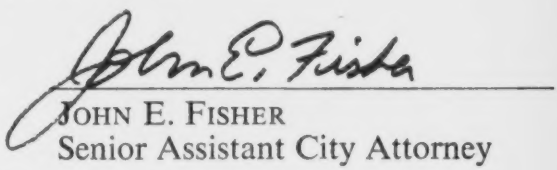
By: 

P. O. Box 1562
Houston, Texas 77251
(713) 247-2000

Attorneys for Petitioners

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of March, 1988, true and correct copies of the foregoing instrument were forwarded by United States Mail, postage prepaid, to all other attorneys of record.



JOHN E. FISHER
Senior Assistant City Attorney

APPENDIX

APPENDIX A

Moses LEROY, et al, Plaintiffs,

v.

CITY OF HOUSTON, et al,
Defendants.

GREATER HOUSTON CIVIL
COUNCIL, INC., Plaintiff

v.

Frank MANN, Defendant.

Moses LEROY, Plaintiff,

v.

CITY OF HOUSTON, Defendant.

Civ. A. Nos. H-78-2174, H-73-1650
and H-75-1731.

United States District Court,
S.D. Texas
Houston Division.

Aug. 1, 1986.

Proceeding was instituted on motions for an award of attorney fees and expenses in litigation to guarantee voting rights. The District Court, McDonald, J., held that filing litigation and unceasing efforts by plaintiffs' attorneys before the Department of Justice, being essential catalysts to the adoption by city of a new system of electing

its city council members, were such as to make plaintiffs prevailing parties and, under *Johnson* factors as complemented by "lodestar" approach after application of the contingency multiplier, warranted an award of $984,801.-50 in attorney fees and $40,430.92 in expenses by reason of some 4659.95 hours expended by plaintiffs' attorneys.

Motions granted.

See also, 592 F.Supp. 415, 584 F.Supp. 653.

L.A. Greene, Jr., Houston, Tex., George Korbel, Jessie Botello, Craig Washington, Frumencio Reyes, San Antonio, Tex., David Boddie, Houston, Tex., for plaintiffs.

Denise R. Ferguson, Asst. U.S. Atty., Houston, Tex., for U.S.

Robert M. Collie, Jr., City Atty., John R. Whittington, Jr., John E. Fisher, Sr., Asst. City Atty., Houston, Tex., Paul F. Hancock, Civ. Rights Div., Dept. of Justice, Washington, D.C., for defendants.

Mark A. Posner, Dept. of Justice, Washington, D.C., amicus Curiae.

MEMORANDUM OPINION AND ORDER

McDONALD, District Judge.

Pending before the Court are the Motions for Attorneys' Fees of L.A. ("Al") Greene, George Korbel, Jesse Botello, Craig Washington, and Frumencio Reyes. Having considered the arguments of the parties and the applicable law, the Court is of the opinion that the Motions

should be GRANTED. The filing and the litigation of the cases for which Plaintiffs seek attorneys' fees and Plaintiffs' attorneys' unceasing efforts before the Department of Justice were essential catalysts to the City of Houston's adoption of a new system of electing its City Council members. The Plaintiffs were prevailing parties and should be awarded fees for services performed. The amount of the award is set forth in the tables made a part of this Opinion.

The first case, styled *Greater Houston Civil Council, Inc. v. Mann,* C.A. No. H-73-1650, was a constitutional challenge to Houston's system of electing its City Council members in at-large elections. The case was decided adversely to Plaintiffs at trial, and was appealed to the Fifth Circuit. During the pendency of the appeal, Houston adopted a mixed system of election for City Council members, utilizing both at-large and single-member district elections. The case was declared to be moot and was remanded to the district court for a determination on attorneys' fees. The second case, *Moses Leroy v. City of Houston,* C.A. No. H-75-1731, was a challenge under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1982), after Houston annexed land, did not secure preclearance from the Department of Justice or declaratory judgment from the District Court for the District of Columbia, and attempted to hold an election. The court hearing *Leroy* refused Plaintiffs' requested injunction and the case was closed after the Justice Department precleared the changes. The third case, *Moses Leroy v. City of Houston,* C.A. No. 78-2174 [hereinafter referred to as "*Leroy* II"], also challenged an election scheduled to be held after annexations that had not been precleared or declared not to violate § 5 by the

District of Columbia court.[1] During the pendency of this litigation Plaintiffs' lawyers met with officials of the Department of Justice who were considering the City's request for pre-clearance.

I. The legal standards relevant to attorneys' fee awards.

[1] Questions to be considered when making an award of attorneys' fees are: who is the prevaling party; for what services, if any, performed before an administrative agency may the prevailing party be compensated; how are fees computed; and how does the multiplier apply. Plaintiffs' lawyers have requested fees under 42 U.S.C. § 1988 and § 1973*l*(e), which respectively provide that:

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 . . . or title VI of the Civil Rights Act of 1964 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendments, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[2]

42 U.S.C. § 1973*l*(e).

---

1. The cases are discussed in more detail below.

2. The standards for awarding attorneys' fees under the Voting Rights Act are the same that govern awards under § 1988. *Coalition to Preserve Houston v. Interim Board of Trustees of the Westheimer Independent School District*, 494 F.Supp. 738, 742 (S.D. Tex. 1980),

The Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S. Ct. 1933, 1937, 76 L.Ed.2d 40 (1983) (footnote omitted), outlined the purposes of the statutes in one of its most recent discussions of § 1988:

> In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975), this court reaffirmed the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary. In response Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizing the district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation. The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R.Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " S.Rep. No. 94-1011, p. 4 (1976), U.S.Code Cong. & Admin.News 1976, p. 5912 (quoting *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L.Ed.2d 1263 (1968).

Unfortunately, awarding fees for civil rights litigation has also spawned, in many instances, "a second major litigation" over those fees. *See id.* at 437, 103 S. Ct. at 1941; *see also Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4, 29 (D.C. Cir. 1984), *cert. denied,* 472 U.S. 1021, 105 S. Ct. 3488, 87 L.Ed.2d 622 (1985) (court

---

dismissed, 450 U.S. 901, 101 S. Ct. 1335, 67 L.Ed.2d 325 (1981); *see also Hensley v. Eckerhart,* 461 U.S. 424, 433 n. 7, 103 S. Ct. 1933, 1939, n. 7, 76 L.Ed.2d 40 (1983) (discussing indications in legislative history that standards for fee awards should be the same under § 1988 and the 1964 Civil Rights Act).

"aghast" at number of hours devoted solely to fee request); *Tasby v. Wright,* 550 F.Supp. 262, 285 (N.D. Tex. 1982) (main case and fee award litigation constitute "seemingly endless legal struggle"); *In re Fine Paper Antitrust Litigation,* 98 F.R.D. 48, 68 (E.D. Pa. 1983), (task of awarding fees in antitrust suit "not . . . an easy one" when judge has to consider voluminous time records, objections thereto, and 41 days of testimony regarding fee petitions) *rev'd in part on other grounds,* 751 F.2d 562 (3d Cir. 1984). The court can attest to the lengthiness and difficulty of awarding fees in the case at bar, the process having taken over three years for the court to reach the point where it could decide the issues. Along the way, *inter alia,* the court has granted the Defendants four continuances on hearings and has allowed innumerable extensions of time for filings. The Defendants also sought unsuccessfully to recuse the court. *See In re City of Houston,* 745 F.2d 925 (5th Cir. 1984). Plaintiffs' lawyers alone have expended 1737 hours.[3]

[2] In reaching its decision on attorneys' fees, the court must consider and apply four legal standards. The first two standards concern the question of entitlement to fees, *i.e.,* who is a "prevailing party" under the statute and for what administrative work, if any, prevailing par-

---

3. The court notes that the hours spent on the fee petitions amount to approximately one-third of the fees requested for a series of cases that began in 1973.

The court also notes that C.A. No. H-78-2174 has been amended to include claims that the city violated the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* and the Constitution in 1985. Hours expended in the claim will not be considered in any way in the instant Order. A decision on fee petitions for the work performed in regard to this claim amended in 1985 is reserved for another day, should the Plaintiffs prevail.

ties can be compensated. The second two standards relate to the computation of fees to which a party may be entitled, *viz,* the liability of the so-called *Johnson* factors[4] and under what circumstances multipliers are to be used. The court will address each of these legal issues individually, and then proceed to discuss how those factors apply to the cases at bar.

The first standard requiring discussion is the definition of "prevailing party." The statute allows only prevailing parties to receive fees. The parties in the cases at bar[5] offer different formulations of the test for determining who is a prevailing party. Plaintiffs' lawyers contend that the Supreme Court has set out a standard in *Hensley v. Eckerhart,* 461 U.S. 424, 429-30, 103 S. Ct. 1933, 1937-38, 76 L.Ed.2d 40 (1983). However, the Supreme Court did not adopt the standard as its own, but merely recognized that the First Circuit had enunciated a standard. The Supreme Court appears not to have adopted any definition of "prevailing party," and the Court must therefore turn to the Fifth Circuit's recent opinion on the subject, *Hennigan v. Ouachita Parish School Board,* 749 F.2d 1148 (5th Cir. 1985).

[3] In *Hennigan,* the Fifth Circuit reversed a decision by a district court judge that a plaintiff was not a prevailing party. Judge Rubin, writing for the panel, acknowledged that:

---

4. The *Johnson* factors are the twelve considerations the Fifth Circuit stated a court should take into account when deciding awards of attorneys' fees. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 716-19 (5th Cir. 1974).

5. The principal Defendant in each of the cases is the City of Houston. The Court will hereinafter, for the sake of convenience, refer to the Defendants as "the City" or "Houston."

> The Fifth Circuit opinions have not articulated a consistent standard for measuring whether a plaintiff whose efforts did not result in a judgment in his favor has succeeded sufficiently to be a prevailing party. The district judge may understandably have been misled, for we have phrased the test differently, in a number of opinions.

Id. at 1151 (footnote omitted). The opinion goes on to explain the burden a fee applicant carries:

> Despite their variety, all of our prior formulations of the applicable criteria have certain elements in common. All recognize the initial need to identify the goal that the plaintiff sought to achieve in bringing his civil rights action. Although the opinions have not always identified the precise legal or factual condition that the plaintiff sought to change, all have determined the nature of the benefit the plaintiff hoped to gain, or the burden of which he hoped to be relieved, by bringing the lawsuit.
>
> Using this as a benchmark, the first element that must be established by a plaintiff claiming prevailing party status is whether, as a practical matter, the plaintiff's goal was achieved. *This is determined in this circuit by applying the central-issue test.* In other circuits, as we have discussed, the plaintiff need "succeed [only] on any significant issue in the litigation which achieves some of the benefit [he] sought in bringing suit."
>
> When the plaintiff's goal has been achieved by the defendant's unilateral action, the plaintiff must of course also show that the lawsuit caused the defendant to act, and thus allowed the plaintiff to achieve his desired goal. To demonstrate this causal connection, *the plaintiff must demonstrate that his suit was a "substantial factor or a significant catalyst in motivating the defendants to end their unconstitu-*

> *tional behavior.*" This means more, however, than merely showing that the event occurred after suit was filed. Here, as elsewhere in the law, *propter hoc* must be distinguished from *post hoc*. The inquiry has been described as "an intensely factual, pragmatic one," and courts should carefully consider the chronology of events in order to assess the provacative effect of the plaintiff's lawsuit.
>
> *When the plaintiff has shown both that he succeeded on the central issue in the litigation and that the lawsuit caused the defendant to act, he has made a prima facie case that he is the prevailing party and entitled to attorney's fees.*

Id. at 1152 (footnotes omitted) (emphasis added). Defendants contest the propriety of an award by claiming that the applicants did not cause ameliorative action to have been taken. *Hennigan* addresses this claim:

> However, a plaintiff who brings an action that has no colorable, or even reasonable, likelihood of success on the merits is not entitled to recover attorney's fees if the defendant simply complies with the plaintiff's demands and moots the case for reasons that have nothing to do with the potential merit of the suit. Whether activated by economic, political, or purely personal concerns, a defendant may choose voluntarily to make the change sought in the suit rather than undergo protracted and expensive litigation.
>
> *A defendant who contends that his conduct was a wholly gratitous response to a lawsuit that lacked colorable merit, must demonstrate the worthlessness of the plaintiff's claims and explain why he nonetheless voluntarily gave the plaintiffs the requested relief.* Forcing the defendant to establish that the plaintiff has not presented a cognizable claim is con-

> sistent with the Federal Rules of Civil Procedure which allocates this burden to the defendant at every stage of the litigation.

Id. at 1153 (emphasis added) (footnote omitted).

The second standard to be applied in considering the question of entitlement to fees concerns the extent to which a lawyer can recover compensation for work performed in administrative proceedings. This question first arose in the City's Motion to Exclude from consideration in this case Plaintiffs' Claims for Attorneys' Fees for Legal Services Performed in Other Cases and Administrative Proceedings. The City argues in its Motion that fees were not available under § 1988 for work performed in administrative actions. The Court denied the Motion. Since the Motion was denied, the Supreme Court decided *Webb v. Board of Education of Dyer County,* 471 U.S. 234, 105 S. Ct. 1923, 85 L.Ed.2d 233 (1985). The City in its Brief on Attorneys' Fees argues on the basis of *Webb* that attorneys' fees are not available for any administrative work in the case at bar. The Court disagrees that *Webb* precludes any compensation for this work and likewise concludes that it is not an absolute bar to recovery of payment for services performed before an administrative agency. Further, this Court will discuss the Fifth Circuit's most recent decision on administrative work, *Arriola v. Harville,* 781 F.2d 506 (5th Cir. 1986).

Webb involved the termination of a black teacher's employment. The teacher claimed that his firing was unjustified. He challenged his dismissal by way of appeal to a state board. The teacher appeared before the board with his lawyer, but obtained no relief. Subsequently, suit was filed in federal court, complaining of both the dis-

missal and the board's allegedly racially based decision. Plaintiff received damages and his lawyer petitioned for fees under 42 U.S.C. § 1988. The Supreme Court ultimately ruled that the lawyer was not entitled to fees under § 1988 for the work he did before the board. Although the Supreme Court did not specify its reasons for denying the fee request, it did note that:

> Congress only authourized the district courts to allow the prevailing party a reasonable attorney's fee in an "action or proceeding to enforce [§ 1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983. . . .

Id. at 1928 (footnote omitted).

* * * *

> When the attorney's fee is allowed "as part of the costs"—to use the language of the statute—it is difficult to treat time spent years before the complaint was filed as having been "expended on the litigation" or to be fairly comprehended as "part of the costs" of the civil rights action.

Ibid.

* * * *

> The petitioner made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement.

Id. at 1929.

What, then, does *Webb* say to courts deciding fee petitions? It clearly does not say that no one may ever collect fees for time expended in administrative proceedings. The Court's conclusions in *Webb* were limited to the facts of that case. It also, at least implicitly, endorses the idea that materials from a proceeding for which one could not normally receive compensation under 42 U.S.C. § 1988, if used in a proceeding for which a fee award is available may be compensable. *Id.* at 1928-29.

And by allowing the award to Webb's lawyer for a case that settled, the case supports the practice of awarding fees for cases where non-trial procedures such as settlement win the day for a plaintiff.[6] The Second Circuit ad-

---

6. *See, e.g., Wooten v. Housing Authority of the City of Dallas,* 723 F.2d 390 (5th Cir. 1984) (plaintiff was prevailing party for purposes of § 1988 when her lawsuit caused Housing Authority to change policy originally spurring lawsuit, mooting case). The court in *Wooten* noted:

> In *Williams v. Leatherbury,* 672 F.2d 549, 550 (5th Cir. 1982), we noted that "[v]ictory by judgment or an opponent's concession is not essential to identification of the 'prevailing party' entitled to recovery of an attorney's fee under [§ 1988]." A party could prevail in an out-of-court settlement, or a defendant might moot the suit by taking unilateral capitulatory action. A plaintiff who attains the sought-after relief by such means "may still recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action and that the defendant's conduct was required by law. . . ." *Id.* at 551. We defined "causal connection:" to mean that "[t]he suit must be 'a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior.' "

Id. at 391, *quoting Robinson v. Kimbrough,* 652 F.2d 458, 466 (5th Cir. 1981). Directly applicable here is the holding of *Davis v. City of Ennis,* 520 F.Supp. 262 (N.D. Tex. 1981) (three judge court), that a plaintiff who can show a causal connection between his suit and the events that moot his claim will be deemed to have prevailed even though he never obtained a court order in his favor that directly relates to the merits. *Id.* at 265, *cited with approval in Smith v. Thomas,* 687 F.2d 113, 116 (5th Cir. 1982).

dressed the specific question of preclearance review proceedings which lead to settlements:

> Arguably, where the initiation of litigation is necessary to compel defendants to obtain preclearance before holding an election, lobbying efforts in a preclearance review might bring the litigation to a quick and successful end, a goal consistent with the statutory purpose of Section 1973 l(e).

Gerena-Valentin v. Koch, 739 F.2d 755, 759 (2d Cir. 1984).[7] The Fifth Circuit found it unnecessary to reach the question of whether attorney's fees can ever be awarded for participation in a preclearance review. *Posada v. Lamb County, Texas,* 716 F.2d 1066, 1074 (5th Cir. 1983).[8]

Opinions that have been rendered since the hearing on the Motion for Attorneys' Fees have been reviewed and considered and do not affect the Court's decision awarding fees to the Plaintiffs.

The first such case is *Arriola v. T.L. Harville,* 781 F.2d 506 (5th Cir. 1986). *Arriola* does not call for a different result—the Fifth Circuit expressly so holds:

---

7. The Second Circuit's opinion made much of the legislative history of § 1973*l*(e), which refers to "action" and "proceeding" as meaning litigation. But, at the same time, the opinion adds immediately thereafter that "[t]here is thus little or no textual warrant for a construction of the fee awards provision which applies it to lobbying in preclearance reviews *not in aid of catalytic litigation.*" *Gerena-Valentin v. Koch,* 739 F.2d 755, 760 (2d Cir. 1984) (emphasis added).

8. Defendant's argument that administrative procedures are neither actions nor proceedings for purposes of § 1988 therefore misses the point that work done in administrative contexts can be compensable as part and parcel of a successful action or proceeding, a lawsuit.

> As will be evident from our later discussion, this holding does not preclude compensation for services rendered in a preclearance submission that bear directly on the issues in an independent lawsuit and where that work is required and necessary to resolve the issues of the independent lawsuit.

Id. at 507 n. 1. The services performed by counsel for the Plaintiffs in their efforts before the Department of Justice were part and parcel of the ongoing litigation in the federal courts. Basically the issue was whether the totally at-large system of electing persons to sit on the City Council must be modified as a matter of law. Counsel for Plaintiffs had to proceed on various fronts contemporaneously.

In *Arriola* the Fifth Circuit found that Plaintiffs there had received a final judgment of exactly the relief they had sought—an injunction. (The only relief they could have received in a § 5 suit such as theirs.) Plaintiffs had sought to characterize their involvement in the preclearance process as the "remedy phase" of the litigation. *Id.* at 511. The Fifth Circuit found this characterization "artful" but held that Plaintiffs efforts in the preclearance process "could not have been useful or required for the litigation." *Id.* at 511-12.

[4] This Court finds the cases before it to be proper candidates for the recovery of attorney fees in accordance with *Arriola* and *Webb*. Services performed before the Justice Department for preclearance submissions occurred while the various parties were pursuing their judicial remedies. The work done before the Justice Department was a direct catalyst of change necessary to the resolution of the lawsuits.

Two very recent cases of the United Supreme Court are also of relevance: *City of Riverside v. Rivera,* ____U.S. ____, 106 S. Ct. 2686, 91 L.Ed.2d 466 (1986) and *Thornburg v. Gingles,* ____U.S.____, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986). *Riverside* reaffirms the use of the "lodestar approach," provides further instruction on who is considered to be the prevailing party, and recognizes the continued viability and appropriateness of the use of the "multiplier." *Thornburg* constitutes a continuing recognition of the importance of the use of experts and of the factors initially enunciated *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974).

Having discussed the first two questions, i.e., (1) when is a party to be considered as "prevailing" and (2) for what services, if any, performed by an attorney before an administrative agency are compensable, the Court turns to the second two questions: the computation of fees under *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974) and the extent to which the "multiplier" affects those *Johnson* factors.

Preliminarily, the question is whether the factors outlined in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974) as guideposts in fee awards have survived *Blum v. Stenson,* 465 U.S. 886, 104 S. Ct. 1541, 79 L.Ed.2d 891 (1984). The City argues that the factors did not, while Plaintiffs' lawyers argue that *Johnson* is still good law. The City takes the position that the "lodestar" approach is the exclusive method of allocating fees. The Court rejects that argument, finds ample support for the continued viability of *Johnson,* and considers that it must discuss those factors. The Court considers that *Blum* did little to alter the fundamental premise of *Johnson.*

[5] *Johnson* has, since its inception, been the leading case in the Fifth Circuit on attorney's fees. The *Johnson* court listed twelve factors which district courts making fee awards were to consider: *1)* time and labor required; *2)* novelty and difficulty of the questions; *3)* skill requisite to perform the legal service properly, *4)* preclusion of other employment by the attorney due to acceptance of the case; *5)* customary fee; *6)* whether the fee is fixed or contingent; *7)* time limitations imposed by the client or the circumstances; *8)* amount involved and results obtained; *9)* experience, reputation, and ability of the attorneys; *10)* "undesirability" of the case; *11)* nature and length of the professional relationship with the client; and *12)* awards in similar cases. *Johnson,* 488 F.2d at 717-19.

Johnson has not escaped criticism, however. Several commentators have expressed reservations about the factors.[9] Courts have also criticized *Johnson.* In *Northcross v. Board of Education of the Memphis City Schools,* 611 F.2d 624, 642-43 (6th Cir. 1979), *cert. denied,* 447 U.S. 911, 100 S. Ct. 2999, 64 L.Ed.2d 862 (1980) the court expressed its concerns as follows:

> We have learned through experience, however, that merely providing a check list of factors to consider does not lead to consistent results, or, in many cases, reasonable fees. Many of the factors are overlapping, and there is no guidance as to the relative importance of each factor, or indeed, how they are to be

9. *See, e.g.,* Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 YALE L.J. 473, 503 (1981) (*Johnson* fails to promote uniformity in fee awards; Comment, *Adjusting Attorney Fee Awards Through Multipliers in Antitrust Class Actions,* 21 HOU. L. REV. 801, 838 (1984) ("*Johnson* gives little effective guidance, because as a whole, the *Johnson* factors are vague and duplicative.") [hereinafter cited as "Comment"].

> applied in a given case. We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and "the experience, reputation and ability of the attorney."

District Courts, with the initial responsibility for applying the factors, have also found fault with the *Johnson* test:

> The Fifth Circuit has repeatedly insisted that the *Johnson* factors control the district courts' computation of attorneys' fees. Although these criteria remain central to any fee determination, we conclude that the consideration of these factors, without more, cannot guarantee a rational, reasonable setting of fees. *See Copeland v. Marshall,* 641 F.2d 880, 890 (D.C. Cir. 1980) (en banc).
>
> "The fundamental problem with an approach that does no more than assure that the lower courts will consider a plethora of conflicting and at least partially redundant factors is that it provides no analytical framework for their application. It offers no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all." *Copeland v. Marshall,* 641 F.2d at 890. District judges for this reason, have had difficulty applying the *Johnson* factors. *Id.*

Riddell v. National Democratic Party, 545 F.Supp. 252, 255-56 (S.D. Miss. 1982), *rev'd in part on other grounds,* 712 F.2d 165 (5th Cir. 1983).

[6] Since *Johnson* the Fifth Circuit has incorporated the twelve factors into the "lodestar" analysis employed by many circuits. As the Fifth Circuit explained in *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 583 n. 15 (5th Cir. 1980):

> The *Johnson* test, as interpreted in *First Colonial*, is similar to the Third Circuit's "lodestar" method of computing attorneys' fees. *See Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.*, 3[d] Cir. 1976, 540 F.2d 102, 112-18; *Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.*, 3[d] Cir. 1974, 487 F.2d 161, 167-69; *accord, City of Detroit v. Grinnell Corp.*, 2[d] Cir. 1977, 560 F.2d 1093, 1098-1103; *City of Detroit v. Grinnell Corp.*, 2[d] Cir. 1974, 495 F.2d 448, 469-74; *Grunin v. International House of Pancakes*, 8[th] Cir., 513 F.2d 114, 128-29, *cert. denied*, 1975, 423 U.S. 864, 96 S. Ct. 124, 46 L.Ed.2d 93; *Knutson v. Daily Review, Inc.*, N.D. Cal. 1979, 479 F.Supp. 1263, 1268-72. Under the "lodestar" analysis, the district court must first [sic] determine the number of hours reasonably spent by the plaintiff's attorney on matters upon which the plaintiff was successful. Next, the court must ascertain the value of the attorney's time based on his or her normal billing rate. If a number of attorneys are involved, the court may use different rates to reflect the different amounts of skill, expertise, and experience possessed by the different attorneys. The court then must determine the "lodestar" amount by multiplying the hours spent by each attorney on the case by his or her respective hourly rate. Before arriving at a final award, at least two other subjective factors must be considered. The first is the contingent nature of success. The second factor is the extent to which any exceptionally positive or negative quality of an attorney's work mandates in-

> creasing or decreasing the lodestar. A fact to be considered in making this adjustment is the amount recovered in damages as compared to the defendant's potential liability. *See Knutson v. Daily Review, Inc.*, 479 F.Supp. at 1269-70. *See generally* Comment, Attorneys', Attorneys' Fees in Individual and Class Action Antitrust Litigation, 60 Cal. L. Rev. 1656 (1972).

Some have suggested that the "lodestar" approach and *Johnson* are two wholly different methods of determining what to award a prevailing party's lawyer. *See New Approaches to Attorney's Fees: The Judge's Role in Class Actions,* 24 The Judges' J., 12, 14-15 (describes "lodestar" theory and calls *Johnson* "another mode of analysis"). Others, the Court feels correctly, consider that *Johnson* and the "lodestar" approach complement one another. Comment at 832 (footnote omitted) ("The 'lodestar' method does not conflict with *Johnson* but furnishes an orderly regimen for examination of the factors listed."). In integrating the "lodestar" method and *Johnson,* the Court awarding fees must undertake a three-step analysis:

> The Court of Appeals of the Fifth Circuit, progenitor of the *Johnson* factors has recognized these problems. It therefore has instructed district courts to first ascertain the nature and extent of the services supplied by the attorney from a statement showing the number of hours worked and an explanation of how these hours were spent. The court should next determine the customary hourly rate of compensation. These are essentially *Johnson* facts 1 and 5. The court should then multiply the number of hours reasonably expended by the customary hourly rate to determine an initial amount for the fee award. Finally, the court should adjust the fee on the basis

> of the other factors, briefly explaining how they affected the award. *In re First Colonial Corp. of America,* 544 F.2d 1291, 1298-1300 (5th Cir. 1977). *See also Copper Liquor, Inc. v. Adolph Coors Co.,* 624 F.2d 575, 581-84 (5th Cir. 1980).

Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981). *See also Tasby v. Wright,* 550 F.Supp. 262, 275 (N.D. Tex. 1982) (*Johnson* test similar to "lodestar" three-step method of computing attorneys' fees); Comment at 832 (though *Johnson* does not specifically require the "lodestar" approach, factors 1 and 5 embrace its component parts). *See generally Copper Liquor,* 624 F.2d at 583 (the *Johnson* test is similar to the "lodestar" method of computing attorneys' fees). ". . . There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained'." *Hensley,* 103 S. Ct. at 1940. The opinion continues in a footnote to adopt an approach somewhat like the Fifth Circuit's, but with a caveat as to duplication:

> The district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-719 (CA5 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. *See Copeland v. Marshall,* 205 U.S. App. D.C. 390, 400, 641 F.2d 880, 890 (1980) (en banc).

Id. at n. 9.

Blum v. Stenson did not alter this course; it merely expanded on it. *Blum* acknowledged that upward adjustments are appropriate in some cases, *Blum,* 105 S. Ct. at 1548. However, several *Johnson* factors were described

as being properly taken into account in determining the base rate and not the multiplier including novelty and complexity of the issues[10] and results obtained.[11]

Thus, although the Supreme Court has reshuffled the *Johnson* factors somewhat, the factors are still alive and well. This Court cannot agree with the City's reliance on *Patrick v. Board of Trustees of the Mineola Independent School District,* 603 F.Supp. 754, 759 (E.D. Tex. 1984), which states,

> Before *Blum,* a court was required to direct light from the lodestar through the twelve filters enumerated in *Johnson,* in order to determine whether an overall adjustment of the product of hours-times-rate was necessary to make fees reasonably compensatory. In *Blum,* the court held that the prevailing hourly rate in the community already subsumes most of the factors listed in *Johnson, id.* The only *Johnson* factor to survive *Blum* is contingency, that is, the degree of risk that the action will be unsuccessful, and also that payment will be delayed.

The Supreme Court, for instance, specified in *Blum* that a multiplier would be available for exceptional success and quality of service "superior to that one reasonably should expect in light of the hourly rates charged. . . ." *Blum,* 104 S. Ct. at 1549. Contingency therefore cannot be the only *Johnson* factor left after *Blum.* Consequently, the City errs in the position taken in its briefing by not addressing to any degree the *Johnson* factors.[12]

---

10. *Blum,* 104 S. Ct. at 1541, 1548-49.

11. *Id.* at 1549.

12. The Court often asks for additional briefing. However, such a request would be inappropriate since the City has taken the position that as a matter of law the *Johnson* factors do not apply in light of *Blum.*

The last of the four questions the Court must examine before applying the applicable law to the facts concerns the role of the "multiplier." The City's argument here is inconsistent. The City argues in its brief that "in a civil rights attorneys' fees setting only one contingency risk is present, the risk of non-payment." (Defendant's Brief, pp. 75-76) The City discusses shortly thereafter the division of the circuits "on the question of whether a contingency multiplier based on risk of loss is available," *Id.* at 76. The City never states what its position is. Presumably, its position would be that a multiplier based on risk of loss is available. But why, then, would *Hensley* and *Blum* both reaffirm that multipliers are still available,[13] if risk of loss is the only risk left?

[7] The Court is persuaded that risk of loss is still compensable via a multiplier. The Supreme Court expressly left this question open.[14] The Fifth Circuit has explicitly stated that "the contingent nature of [the] suit" figures into the Multiplier, and that "[u]nder the rubric of 'the contingent nature of success' the district court should appraise the professional burden undertaken—that is, the probability or likelihood of success, viewed at the time of filing suit." *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983); *see also Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more than those who are assured of compensation regardless of result. This

13. *Blum*, 104 S. Ct. at 1549-50; *Hensley*, 103 S. Ct. at 1940.

14. "We have no occasion in this case to consider whether the risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment." *Blum*, 104 S. Ct. at 1550 n. 17.

is neither less nor more appropriate in civil rights litigation than in personal injury cases."); *Tasby v. Wright*, 550 F.Supp. at 276 (defining "the contingent nature of the employment, *i.e.*, the recovery of attorney's fees by applicants was wholly contingent upon their prevailing in the litigation. . . ."). *C.f. Nicholson v. Bates*, 544 F.Supp. 256, 259 (E.D. Tex. 1982) (case deemed not contingent because lawyers realized from the outset that Plaintiff could not pay their fees). The Fifth Circuit has recently once again recognized the propriety of enhancement of a fee award for the potential of the Plaintiff not prevailing. The application of the multiplier as a part of *Johnson* factor (6) is thus clearly appropriate.[15]

II. The application of the standards to the case at bar.

[8] Having discussed the four legal questions this Court has to consider in determining the propriety of the award of attorneys' fees to the Plaintiffs, the resulting standards must be applied to this case. Rather than undertake a discrete exegesis of the pertinent facts, the Court will discuss the facts in conjunction with its legal conclusions. The Court will first set out the reasons that Plaintiffs' lawyers are entitled to an award of fees. Then the Court will discuss what amount is due the lawyers.

Until the mid-1950's the City of Houston ("the City") elected members of its City Council from residency districts. The City then changed its method of electing the members of its City Council to a system whereby all candidates for City Council ran at-large. (Tr. vol. 7, p. 21) Many minorities thereafter began to work for the adoption of single-member districts. For example, the

15. *Van Ooteghem v. Gray*, 774 F.2d 1332, 1339 (5th Cir. 1985).

State Legislature in 1973 and 1975 was presented with bills to change the method of election of City Council members to a single-member district scheme. Then State Representatives Anthony Hall, Ben Reyes, and Craig Washington all introduced such bills. (Tr. vol. 3, pp. 21-22) Similar bills had changed the method of electing members of the board of the Houston Independent School District to election by single-member districts. (Tr. vol. 9, pp. 157-58) However, there was great resistance to the '73 and '75 bills from the City in the Legislature. The influence of the City against the single-member district bills proved fatal to the bills. For example, lobbyist, Jim Short used his influence against the bills, and the City swayed the necessary votes that insured that Houston's method of electing its City Council members would not change. (Tr. vol. 3, p. 35) In 1975, the City held a straw vote to determine whether the population wished to change the method of electing City Council members from at-large to single-member. The straw vote proved favorable to single-member districts. However, the City took no action to change the method of electing City Council members in accord with the wishes of the populace as expressed in the straw vote. (Tr. vol. 3, pp. 35-36) Nevertheless, politicians of the time, have maintained that they would have proposed single-member districts, but for the lack of support, and that the political process itself would have eventually caused those districts to be created anyway. The Court concludes that the support was there but the politicians responsible for the change were not. *See* discussion *infra*. After the 1975 referendum, many citizens tried to get enough signatures to change the charter and change the method of election to single-member district. The petitions failed, due to an inadequate number of signatures. (Tr. vol. 3, p. 68)

The other attempts to get the City to adopt single-member districts having failed, the minority community turned to litigation as is next recourse. In 1973, Herman Lauhoff, the President of the Greater Houston Civic Council of Organizations,[16] a community group composed in large part of minorities, and Neal West asked Al Greene to look into the possibility of a suit to challenge the constitutionality of at-large elections of City Council members in Houston. Al Greene initially worked alone; Mr. Greene ultimately appealed to George Korbel to help him in the lawsuit, and Mr. Korbel in turn brought Mr. Botello into the case. Frumencio Reyes and Craig Washington later joined the group. Mr. Greene also asked the Mexican-American Legal Defense Fund ("MALDEF") for help, but MALDEF was not able to aid the litigants.

The first case, *G.H.C.C.O. v. Mann,* C.A. H-73-1650, was a challenge under the Fourteenth Amendment of the United States Constitution to at-large election of members of the City Council. Mr. Greene initiated the case. The other lawyers worked with Mr. Greene thereafter, garnering evidence and preparing witnesses. Finally, all the lawyers devoted themselves to the trial of the case before the Honorable Allen B. Hannay, who is now deceased. That trial took place in 1977. That Court entered judgment for the City. The case was appealed to the United States Court of Appeals for the Fifth Circuit. The Department of Justice ultimately filed an *amicus curiae* brief in the case before the Fifth Circuit, taking the Plaintiffs' position. Houston subsequently adopted a single-member and at-large method of electing City Coun-

16. Hereinafter, the Greater Houston Civil Council of Organizations will be referred to as "GHCCO."

cil members and mooted the case while it was pending before the Fifth Circuit.[17] The record indicates that the parties perceived a strong possibility existed that the case would have been remanded for a new trial. That, for example, was the view of the lead attorney for the Plaintiff, Mr. Greene. In addition, the Court is cognizant that the Fifth Circuit sent back many such cases for retrial during the relevant period for necessary fact findings. (Tr. vol. 7, pp. 129-30) And the Court notes that the City's three projected scenarios for *Mann's* probable disposition in the Fifth Circuit would have involved a remand. Fred Hofheinz, the Mayor of Houston during the period, stated that, after trial, the City considered 73-1650 not to be a live case and felt confident of victory. (Tr. vol. 8, p. 114). However, the Court notes that evidence in the record clearly indicates that the City had hired expert witnesses, the consulting firm of Hamilton & Rabinowitz, to assist in the retrial. The City contends that the evidence of their hiring Hamilton & Rabinowitz does not clearly show that they anticipated retrial, arguing that the contract does not clearly show that 73-1650 was the case for which Hamilton & Rabinowitz, Inc. was hired. Nevertheless, the Court notes that the City spent over $63,000.00, (Tr. vol. 7, p. 130), for the contract and that the City's budgetary notations regarding that contract referred to Hamilton & Rabinowitz's "professional consulting services in connection with the analysis of issues raised by litigation, administrative proceedings and legislation [sic] relating to boundary changes by the City." (Plaintiffs' Exh. 32) The Court was told and heard no evidence to the contrary that the

17. According to the order remanding the case, the parties agreed that the constitutional issue decided by the district court and presented on appeal was moot.

only case outstanding at the time against the City of Houston concerning boundary changes was 73-1650. (Tr. vol. 8, p. 21) Thus, the Court can only conclude that these expenses were indeed incurred in anticipation of and preparation for a retrial of 73-1650.

The Court has reviewed the late Judge Hannay's decision. Although this court may have realized a different conclusion, that is not the task with this Court. The fact remains, however, that retrial appeared to the parties to be likely, and this likelihood significantly affected the City's decision to change its system of electing City Council members from all single-member districts.

In 1975, the Plaintiffs once again attempted to get via litigation single-member districts in the City of Houston. They filed the case numbered H-75-1731, which was also styled *Moses Leroy v. The City of Houston.* In this case, the Plaintiffs sought an injunction under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The case concerned elections that had added newly-annexed areas to the City of Houston. The three-judge panel that heard the request for injunction on October 30, 1975 refused that request, noting the great expenditure of resources on the election that had already taken place and stating that the Court would invalidate the elections if the Department of Justice refused to pre-clear the election changes. The Department of Justice eventually precleared the election changes. The case was therefore closed.[18]

---

18. The City argues that the Court in 75-1731 specifically denied the attorneys' fees requested, and that therefore fees for work performed in that case are not now available. The Court considers Defendants' argument to be incorrect. As will be discussed later in more detail, the three cases together eventually forced the City to

The Court notes that the point of all these cases was to get Houston to change the at-large system as a way of electing the members of its City Council. The materials prepared for each of these cases was later used by the Department of Justice. In addition, it is important to note that the City was inundated with complex litigation by the Plaintiffs at all times. The record persuades the Court beyond doubt that it was these cases, coupled with the case described below, that enabled the Department of Justice to take the actions that ultimately forced the City to adopt some single-member districts as a method of electing its City Council, and, in addition, that the cases themselves directly catalyzed the City into changing its method of electing City Council members.

Events moved very swiftly in 1977-78, providing the impetus for the City of Houston to make changes in the election of City Council members, as the Plaintiffs sought. A short overview of the events of that period would show that the City of Houston annexed parts of Clear Lake City on December 30, 1978; Plaintiffs then took the City to court and the Department of Justice joined the suit; using the record in *Mann,* C.A. No. 73-1650, the Department of Justice objected to the City's annexations; and the City therefore had to change its charter to elect the majority of the members of its City

---

adopt single-member districts. And the work in 75-1731, taken as a contribution to the ultimate success of Plaintiffs, should be compensated for. In analogous situations, work for unsuccessful issues that aid in central victory is compensable, *See* discussion *infra; See also Marion v. Barrier,* 694 F.2d 229, 232 (11th Cir. 1982) (per curiam) ("the court must consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case," *quoting Jones v. Diamond,* 636 F.2d 1364, 1382 (5th Cir. 1981) and cases cited *infra*).

Council from single-member districts.[19] After that time, the case at bar was remanded for determination on attorneys' fees. To make this brief overview is not to slight the importance of the course of events that has brought the litigants before the Court. The Court will examine in relative detail the critical events of the period, as it is those events that justify an award of attorneys' fees to Plaintiffs.

In order to understand the events leading up to the instant motions, it's necessary to understand the workings of the Voting Rights Act. That Act, which was extended to Texas in 1975, (Tr. vol. 1, p. 92), has a terrific impact upon jurisdictions it covers. Fundamentally, section 5 of the Voting Rights Act provides that covered jurisdictions either preclear with the Justice Department all changes that will affect voting before those changes are implemented or file an action for a declaratory judgment in the District Court for the District of Columbia, requesting the Court to declare that the changes adversely affect minority voting strength. If in the preclearance process the Department finds that the changes would not significantly act to the detriment of minorities voting power in the covered jurisdiction, the Department will preclear the changes; the changes can then be put into effect. However, if the changes are objected to, the jurisdiction must take further action before any sort of election can proceed. A jurisdiction whose changes fail to win approval may opt to implement its changes and chance being sued by the Department of Justice or private parties. (Tr. vol. 1, p. 93-94) Many cases brought to enforce the provisions of the Voting Rights Act are

19. Nine Council members are elected from single-member districts, while five are elected at-large.

brought by private litigants. Cases under section 5 of the Act are usually less complicated than cases under section 2, (Tr. vol. 1, pp. 80-81), because there are only two issues under section 5, *i.e.*, whether voting changes in covered jurisdictions have been enacted and whether there has been a preclearance of those changes. The issues in C.A. No. H-78-2174 were particularly clear, because the City had made no attempt to preclear the changes that it had made in the voting structure by annexing additional areas. (Tr. vol. 7, p. 195)

When the Department of Justice is trying to decide whether to preclear a voting change, it generally looks at seven factors. The Department examines: *1)* whether racially polarized voting exists in the jurisdiction; *2)* what the electoral history of the region is; *3)* whether having another method of election would make a difference in elections (for example, what the margins of victories of majority candidates have been and whether proposed election changes would have allowed minority candidates to prevail); *4)* case studies; *5)* whether past changes have discriminated against minorities; *6)* the effect of run-offs in the jurisdiction; and *7)* whether, in cases such as in the City of Houston, residency districts or other previously used election devices had actually benefited minority constituents. (Tr. vol. 3, pp. 74-75) The key element in the Department of Justice's determination in a case such as the City of Houston's is to determine whether there is racially-polarized voting.[20] (Tr. vol. 1, pp. 100-01) Racially-polarized voting is voting that is based on race to the virtual exclusion of other factors.

---

20. If obviously discriminatory charges have been made, proof of racially-polarized voting may not be necessary. (Tr. vol. 1, p. 109)

One determines whether racially-polarized voting exists from a number of factors, such as the local history of discrimination, the degree of responsiveness of local officials to their constituents, the responsiveness of those officials to the minority population in particular, the segregation of the community, and the political and social isolation in the community of the minorities. (Tr. vol. 1, pp. 106-07) One determines whether racially-polarized voting exists as a statistical matter by a five-part process. First, one identifies the ethnic and racial composition of the precincts in the area. Then the race of each candidate is determined, and election data for each election is garnered. The next step is to determine whether the precinct has a significant number of other minorities, *i.e.*, is racially pure; finally, one determines how the precinct voted in successive elections. If voting along racial lines has been prevalent, racially-polarized voting exists. (Tr. vol. 1, pp. 102-03) A good example of the elements that the Department of Justice examines is to be found in the case with the City of Houston.

The Department of Justice used many of the elements described above to determine whether to object to the City's annexations. For example, the Department looked at the City's employment patterns to determine whether racial segregation existed. (Tr. vol. 3, p. 182) The Department also looked at the City's old system of residency districts for City Council candidates to see whether black candidates had carried their districts. (Tr. vol. 3, pp. 183-84) The Department found that they did, but lost city-wide. The Department also inquired about Judson Robinson and Leonel Castillo, two minority candidates who were elected in Houston city-wide, as a council mem-

ber and city controller, respectively, and satisfied itself that these elections were aberrations. (Tr. vol. 4, p. 49) The Department examined the effect of run-off elections on minorities, comparing minority success with run-offs in City Council races with success in Houston Independent School District, which did not have run-off elections. (Tr. vol. 3, pp. 182-83) The Department also looked at why Houston had changed from using residency districts in the 1950's (Tr. vol. 3, pp. 183-84) and the general electoral history of Houston. (Tr. vol. 3, p. 175)

The process by which the Department of Justice examines this material is well-prescribed. The jurisdiction submits materials prescribed by regulations to the Justice Department. (Tr. vol. 1, pp. 84-85) The materials contain information about the changes and the jurisdiction. The Department has sixty days within which to object, not object, or ask for further information, (Tr. vol. 6, p. 70) The size of the jurisdiction in some part determines the degree of proof necessary; the more complicated the change and the larger the jurisdiction, the greater the scrutiny given. (Tr. vol. 1, p. 101) The Department of Justice reviews all voting changes in covered jurisdictions, even a change of a voting place from one building to another within the same precinct. (Tr. vol. 7, p. 190)

The resources the Department possesses to deal with the submissions are inadequate to deal fully with the submissions made. The Department of Justice received over 7,000 voting changes in 1979, and employs only 13 non-attorneys and between 10 and 14 attorneys to handle all these submissions. (Tr. vol. 6, pp. 59-60) Over 7,000 jurisdictions, 4,000 in Texas alone, make

submissions. When many jurisdictions were added to the list of those already under the Voting Rights Act in 1975, no more persons were hired to help review submissions. (Tr. vol. 6, p. 74) Moreover, the Department has no budget for expert witnesses to help sort out the many knotty problems a submission may pose. (Tr. vol. 6, p. 79) Of course, the Department generally pays more attention to large submissions than to small ones, and keeps a continuing file on all jurisdictions subject to the Voting Rights Act. (Tr. vol. 7, p. 199) But the numbers above speak for themselves; the Department can scarcely keep up with the work that it has. For example, in the instant case, only David Hunter at the Department of Justice worked directly on the City's extensive submission. (Tr. vol. 7, p. 199) In sum, the Department is spread too thin to handle all the information it receives, and certainly did not have the resources to develop by itself the data regarding Houston which the submission at controversy in this case demanded. (Tr. vol. 3, p. 116; Tr. vol. 4, pp. 78-79)

The record clearly indicates that the Department, because of its limited resources, routinely relies on individuals in jurisdictions making submissions to provide invaluable information with which to judge the submissions. (Tr. vol. 6, p. 77) Reliance upon local persons is particularly heavy in large jurisdictions such as Houston. (Tr. vol. 1, p. 84; Tr. vol. 6, p. 69) In some instances, the Department of Justice calls people in localities whom the Department already knows. For example, the Department has often called organizations and private citizens to ascertain an opinion of a submitted voting change. (Tr. vol. 1, p. 83) However, the Department lacks sources of local information in many communities. In-

stead, it must ask its few contacts in an area for names of other persons who should be called. *Id.* Many who often deal with the Department, such as Jose Garza, consider that the Department relies particularly heavily on comments from lawyers in the locality. The Department often relies on lawyer's comments because those comments generally are written more with an eye to the law and offer more evidence in support of arguments than do those of non-lawyers. (Tr. vol. 4, p. 69; Tr. vol. 6, p. 77) And, without local input, objections are rare. (Tr. vol. 1, p. 84)

Another effect of the limited resources available to the Department of Justice is that the Department often is unable to sue all jurisdictions which do not comply with section 5. (Tr. vol. 7, p. 7) The cases are too numerous and, many times, burdensome in terms of amount of evidence for the Department to handle. (Tr. vol. 6, p. 67) And when the Department does move to enforce, its efforts are frequently unavailing. For example, in Crockett County, Texas, the Department moved to enforce its objection under section 5, but, misunderstanding the local situation, took actions that actually undercut minority voting strength. (Tr. vol. 7, pp. 204-05) In addition, the Department is often not as quick to request injunctions as private parties. (Tr. vol. 7, p. 204) As a result, testimony indicated that the Department generally does not initiate its own section 5 enforcement proceedings. Rather, it files *amicus* briefs or intervenes after locals have moved to enforce section 5. (Tr. vol. 1, p. 98) And such intervention is relatively rare. (Tr. vol. 7, p. 8) The Court is persuaded here that the intervention did little to add to the Plaintiffs' lawyers efforts. *See* discussion *infra.*

Houston underwent the above-described review in 1978 because Plaintiffs filed C.A. 78-2174. C.A. 78-2174 concerned election changes resulting from the annexation of Clear Lake City, changes which had not been precleared.[21] The three-judge panel that heard 78-2174 refused an initial request for injunction because the City withdrew its ordinance calling an election. However, it was at this point clear to the City from the three-judge panel that, were an election called without preclearance of election changes, an injunction would issue. The City made its submission. The Justice Department objected to the submission, due in large part to the Plaintiffs' litigation efforts. On July 11, 1979, the City did call an election without having precleared its election changes, and the three-judge panel enjoined the election on July 19, 1979. (Tr. vol. 6, p. 14)

The Department of Justice did file a companion suit, C.A. 78-2407, and, on December 13, 1978, moved to consolidate with 78-2174 and advocated the Plaintiff's position. (Tr. vol. 7, pp. 197-198) The cases were consolidated on December 15, 1978. However, there was no division of labor between the Justice Department and Plaintiffs. The Department merely intervened to add its voice on the side of the Plaintiffs. (Tr. vol. 6, p. 32) The Plaintiffs did the substantive work. Thus, although the City was forced to deal with the Department of Justice to attempt to obtain preclearance of the voting changes, the Plaintiffs were the ones who actually did the forcing.

In order to understand the events that transpired during the period before the injunction issued, one must un-

---

21. Plaintiffs tried to amend their complaint in 75-1731 in order to include those changes, but the Court denied the Motion for Leave to Amend.

derstand the annexations the City made. Annexation of outlying areas was a top priority of the City during the relevant period. In testimony, witnesses stated that one or two of the members of the Houston City Council may have opposed the City's aggressive policy of annexation, but by and large the Council and the Mayor(s) were firmly behind annexations. (Tr. vol. 8, pp. 134-35) For example, the City annexed much territory during the administration of Fred Hofheinz. (Tr. vol. 8, p. 97) Mayor Hofheinz stated before the Court that annexation was necessary in order to protect Houston's tax base (Tr. vol. 8(p. 98) and testified that he felt that the annexations benefited both Houston and the county. (Tr. vol. 8, pp. 104-05) Similarly, the Mayor who succeeded Hofheinz, Jim McConn, favored aggressive annexation. (Tr. vol. 9, p. 181) Mayor McConn stated that he also felt that annexations were necessary in order to protect the City's tax base. (Tr. vol. 9, p. 181) Support from the Houston City Council was evidenced by the testimony of Councilman Judson Robinson, who stated that he approved of Houston's aggressive annexation policy. (Tr. vol. 8, p. 139) So, for example, on December 28, 1977, Houston annexed the Aldine/Greenspoint Mall area, Inwood Forest/Candlelight Forest, Scarsdale, and Briarwick. (Tr. vol. 10, pp. 46-47) These annexations added to Houston approximately 140,000 people. (Tr. vol. 10, p. 55) The Clear Lake City annexation brought the situation at bar to a head.

Because the Voting Rights Act was extended to cover Texas in 1975, Houston had to preclear the annexations that it made retroactive to 1972. Houston had therefore submitted changes to the Department of Justice before Houston undertook to annex Clear Lake City. Both City

Attorney Robert Collie and Mayor McConn knew that the City would have to preclear any election changes caused by annexations. (Tr. vol. 10, p. 105; Tr. vol. 9, p. 162) The Department had precleared the changes before Clear Lake (Tr. vol. 8, p. 80) but the Clear Lake City annexation did not go so smoothly.

There were two steps in the Clear Lake City annexation. The first step was the annexation of a strip of land in Clear Lake. The Department of Justice approved the strip annexation on October 28, 1977, but by letter to the City of Houston, noted that, were a larger area annexed, objections could be lodged under the Voting Rights Act.[22] (Tr. vol. 8, pp. 100-01) (Defendants' Exh. 1) This letter raises an important question: would the Justice Department actually have undertaken to move the City to adopt single-member districts without the Plaintiffs' intervention? Present conclusions about what actions may have been taken in the past are difficult, but the record indicates nothing to support an affirmative

---

22. The letter stated in pertinent part:

> While our consideration of this submission has not revealed the basis for an objection by the Attorney General, we do note that the annexation here involved is, apparently, a prelude to a more substantial annexation in the future. We also understand that the City of Houston may be considering other annexations which would add a significant number of white voters to the electorate. Should those annexations occur, of course, Section 5 preclearance of those also would have to be obtained and in our consideration of annexations of that nature we would be faced with a more serious question of dilution of the minority voting strength. Accordingly, if such annexations materialize we suggest that the City may want to consider minimizing the dilutive effect of those annexations by some means, such as the adoption of a single-member district system of elections. See, e.g., *City of Petersburg v. United States*, 354 F.Supp. 1021 (D.D.C. 1972), affirmed, 410 U.S. 962, 93 S. Ct. 1441, 35 L.Ed.2d 698 (1973).

Defendants' Exh. 1.

answer. The Department relied heavily on the information the Plaintiffs supplied in objecting. Without an objection, no remedy of adopting single-member districts would have been discussed. In addition, the information generated from the pending litigation which Plaintiffs supplied manifested once and for all the appropriateness of single-member districts.

The Department found the strip annexation unobjectionable because few people lived there. (Tr. vol. 8, p. 103) Altogether, approximately 20,000 people lived in Clear Lake City at the time of the annexation (Tr. vol. 10, pp. 25-26), most of them white. (Tr. vol. 8, p. 104) The purpose of the strip annexation was to take so much of Clear Lake City's land that Clear Lake could not incorporate and avoid annexation by Houston. (Tr. vol. 10, p. 23) The 1977 Texas Legislature actually forced Houston to annex the remainder of Clear Lake City. The Legislature passed a law that meant that Houston had to annex before 1979 or lose Clear Lake forever. (Tr. vol. 8, pp. 98-99) Houston, therefore, annexed Clear Lake City on December 30, 1977.

Before Houston could hold a much-needed bond election, the annexation of Clear Lake City had to be submitted to the Justice Department. The City wished to hold a critical bond election. (Tr. vol. 9, p. 184) Houston, as do other municipalities, pays for its expenditures through bonds. The City has little money available and without a bond election could not pay its debts. Judson Robinson testified that the Houston City Council was very worried because it knew that several cities had not been able to have elections for years because of problems with the Department of Justice and they knew that Houston could not function without the bond issue. (Tr. vol.

8, pp. 147-48) City Attorney Collie testified that in his opinion as City Attorney such an election not involving recently-annexed areas would not be legal. (Tr. vol. 9, pp. 228-231) In any event, Collie testified further, the City did not want a cloud over its bonds from a bond election having been held only in parts of the City. (Tr. vol. 9, pp. 233-34) Thus, although opinions on the City Council of Houston varied from going to court in the District of Columbia to negotiating with the Justice Department (Tr. vol. 9, pp. 222-23), it was clear that the City's best option was to negotiate with the Department. And, at that point, it was also clear that the Clear Lake City annexations could be used to force the City to adopt single-member districts. Senator Craig Washington described the annexations as having leverage and having the City "by the throat" because of the City's need for a bond election and the Department of Justice's refusal to preclear the annexations. (Tr. vol. 3, pp. 69-71)

City Attorney Collie was in charge of the actual preparation under submission. (Tr. vol. 9, p. 160) Before the submission was sent in, the Department of Justice wrote to ask why Houston had not yet submitted the annexation; the City replied that it was working on the submission. (Tr. vol. 10, pp. 27-28) The submission was finally sent to the Department of Justice in February of 1979. (Tr. vol. 10, p. 148) The Plaintiffs entered the preclearance process at this point. The Plaintiffs at first sent letters and telephoned the Department officials, and later actually met with persons reviewing the submission. Evidence in the record indicates sustained contact between Plaintiffs and the Justice Department. Mr. Washington testified that his clients asked Plaintiffs' counsel to go to the Department of Justice concerning the situa-

tion soon after the loss at trial. (Tr. vol. 3, pp. 27-28) After it became clear that the Department of Justice was going to come into the 73-1650 on appeal, and while the Department of Justice was studying the objection, the Plaintiffs rendered invaluable aid to the Department by giving them information that the Department would not have had otherwise. For example, the Plaintiffs gave the full record in 73-1650 to the Department of Justice (Tr. vol. 3, p. 99) and this time record was replete with evidence that the Department utilized regarding racially-polarized voting in Houston. The reliance of the Department of Justice on Plaintiffs is further evidenced by the fact that the Department frequently contacted some of the Plaintiffs' witnesses in 73-1650 while they were considering the City's submission. For example, Mr. Chandler Davidson testified that he spoke several times with David Hunter and Gerald Jones of the Department of Justice. (Tr. vol. 3, p. 180) In addition, one of Plaintiffs' attorneys, Mr. Al Greene, travelled to Washington to apprise the Department of Justice of the situation in Houston, and gave names of community leaders and contacts to the Department, the Department later contacted several of these persons. (Tr. vol. 5, pp. 109-10) The attorneys for the Plaintiffs also met with Department of Justice attorneys in Houston before the objection was lodged. (Tr. vol. 6, pp. 18-20)

The Department of Justice objected to the City's submission on June 11, 1979. (Tr. vol. 6, p. 27) Shortly thereafter, the City asked the Department to withdraw its objection. (Tr. vol. 6, p. 23) The City sent representatives to meet with the Department of Justice to argue for reconsideration. The City Attorney, the Mayor and members of the City Council, including Judson

Robinson, were at that June 20, 1979 meeting. (Tr. vol. 6, pp. 27-28) (Tr. vol. 8, pp. 143-47; Tr. vol. 9, p. 240) The Mayor and the City Council asked the Department of Justice to exclude the Plaintiffs from the meeting, an unusual measure. (Tr. vol. 9, p. 240) During the meeting, the City discussed the submission and various single-member district plans with the Department of Justice. (Tr. vol. 9, pp. 223-25) This meeting was Mayor McConn's only conference with the Department, but the City Attorney met with the Department several times. (Tr. vol. 9, p. 194) The Plaintiffs also met in Washington with the Department of Justice regarding the submission on June 20, 1979. (Tr. vol. 7, pp. 113-14) At that meeting were Ben Reyes, Moses Leroy, E. M. Knight, Chandler Davidson, Herman Lauhoff, Mickey Leland, and George Korbel. (Tr. vol. 7, pp. 113-16) Before the meeting, it appeared that the Justice Department representatives were in a hurry and felt that Plaintiffs had little to offer the Department. (Tr. vol. 3, p. 116) Ben Reyes perceived during the meeting that the Department did not grasp the situation in Houston until studying the Plaintiffs' information. Reyes felt that the Department's representatives' demeanor changed and that those representatives became more interested in the situation after hearing the Plaintiffs. (Tr. vol. 3, pp. 98, 116-117) Similarly, Mr. Davidson perceived that the Department of Justice did not have information critical to its determination on acceptability of the submission. Department of Justice representatives asked questions, such as who the minority candidates in Houston had been before and after the changes effected in the 1950's. (Tr. vol. 3, p. 185) Dr. Davidson could tell from the questions they asked that they were quite ignorant of the situation in Houston. (Tr. vol. 3, p. 186) Dr. Davidson perceived

that Mr. Hunter knew only what was in the City's submission before the meeting. Overall, it was the impression of the Plaintiffs that the meeting substantially changed the way the Department of Justice perceived the situation, and that the information that the Plaintiffs had gathered for litigation substantially altered the viewpoint of the Department of Justice regarding the City's submission. The Department's contacts with Plaintiffs' counsels and experts after the meeting, *See infra,* reinforced that impression which the Court finds credible.

The Department of Justice refused on July 18, 1979 to reconsider its objection. (Tr. vol. 7, p. 122) After all the meetings and discussions with the Department, discussions in Houston regarding the adoption of specific single-member district plans commenced. On July 20, 1979, the Council placed the nine/five[23] plan on the ballot for an August election, along with seven other propositions. The negotiations were between the Plaintiffs and the City in private sessions, as well as with many other people in public and private. (Tr. vol. 9, pp. 166-67) Ultimately, the Department of Justice precleared the annexation after the present plan was passed at an election on August 11, 1979. (Tr. vol. 5, pp. 137-38) Subsequently, the bond election occurred, and the City raised the money needed to conduct City operations. (Tr. vol. 5, pp. 137-38)

The Court has thoroughly reviewed the record in the case at bar and agrees with the Plaintiffs' contention that the instant cases caused the Department of Justice to take its actions against the City and thereby move the

---

23. Under this plan, nine members of the City Council were elected from single-member districts, and five were elected at-large. The Department withdrew its objection on August 21, 1979.

City to adopt a method of electing some City Council members from single-member districts. (*See* Tr. vol. 2, pp. 49-50; Tr. vol. 3, pp. 72, 95-96) The Fifth Circuit's probable remand of 73-1650, continued pressure of litigation every time annexations occurred, and 78-2174 were significant catalysts to adopting the single-member plan. (Tr. vol. 3, p. 33) As Mr. Greene stated during testimony, the Plaintiffs' goal was attaining single-member district elections. The Plaintiffs used different tools, such as litigation in '73, '75, '78, and then employed their litigation skills, materials, and records with the Department of Justice. (Tr. vol. 4, pp. 165-66) And it is of no little import that the Department of Justice itself considers the Plaintiffs to have prevailed in 73-1650. *Voting Rights Act: Hearings on 5.53, S. 1761, S. 1975, S. 1992, and H.R. 3112. Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary,* 97th Cong., 2d Sess. 1804 (1985) (attachments to statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division).

The City argues vehemently that the cases had nothing to do with the Department of Justice's actions or the City's adoption of single-member districts. However, the Court has examined the reasons that the City proffers as an alternative explanation for the Department of Justice's action, and rejects each. The Court will address each of these reasons, and then will enumerate and discuss the reasons which the Court considers compel the conclusion that the litigation was instrumental in moving the Department of Justice to spur the City of Houston to change its method of electing its City Council.

The City contends first that it perceived that it would have succeeded against the Plaintiffs in litigation. Thus,

the City was not moved to action by the lawsuits. (Tr. vol. 8, p. 88 (Day); Tr. vol. 8, p. 118 (Hofheinz); Tr. vol. 10, p. 118 (Collie)) However, this argument misses three points. The first point is that all parties agree that the immediate cause of the City's changing the method of selecting City Council members was the Department of Justice's objection to the annexations and blocking of the bond election. That blocking was brought about in major part because of the case, 78-2174, which the Plaintiffs commenced and prosecuted. Second, the City apparently perceived that it would have to retry 73-1650, and knew from experience that it would have to face challenges in court every time Houston annexed an area; as Houston wished to annex aggressively, that could entail a number of challenges. Third, the materials from previous litigation persuaded the Justice Department that adoption of single-member districts was imperative.

The City also argues, in testimony from both Robert Collie and Fred Hofheinz, that Plaintffis acted politically and not as litigants in dealing with the Department of Justice. (Tr. vol. 10, p. 116 (Collie); Tr. vol. 8, p. 116 (Hofheinz)) Admittedly, it is difficult at some times to differentiate between the role being played by the persons who were politicians and who were also the litigants. The question is whether the Court can separate the Plaintiffs' roles as political figures, which some of the Plaintiffs undeniably were, and Plaintiffs' roles as litigants. The Court must answer that question in the negative, because the Plaintiffs' legal action was by nature intensely political.

The City argues in addition that Houston would have moved to single-member district election had not the Plaintiffs litigated the issue. The Court finds this argument

to be spurious. The City offered at the hearing in support of this assertion the testimony of two former Mayors, Mr. Hofheinz and Mr. McConn, and one City Councilman, Mr. Robinson. These three men said that they supported the adoption of single-member districts for the Houston City Council. (Tr. vol. 8, pp. 94-95 (Hofheinz); Tr. vol. 9, p. 160 (McConn); Tr. vol. 8, p. 148 (Robinson)) However, the City Council never acted in accordance with the wishes of those politically powerful persons. Indeed, former Mayor Hofheinz testified that he tried several times to persuade the City to adopt single-member districts, even to the point of drawing plans for single-member districts. Hofheinz's efforts were to no avail. (Tr. vol. 8, pp. 122-23) Hofheinz admitted in testimony that he did not have a majority to get a single-member district plan passed by the Houston City Council. (Tr. vol. 8, p. 130) In fact, Councilman Judson Robinson testified that the Council never even formally discussed adopting a single-member district plan while Mr. Robinson sat on that Council. (Tr. vol. 8, p. 154) Moreover, as the Court has noted previously, other efforts such as the straw vote and a legislative action to move the City to adopt single-member districts had proved unavailing. (Tr. vol. 8, pp. 150-51) Litigation, therefore was, as one of Plaintiffs' attorneys, Mr. Craig Washington explained, strategically the only way to achieve the adoption of single-member districts in Houston. (Tr. vol. 3, pp. 21-25) And the litigation team was specifically requested by the Plaintiffs to work with the Justice Department while at the same time pursuing this effort in litigation. (Tr. vol. 2, p. 179)

Houston finally argues that the presence of the Justice Department in 78-2174 obviated the need for Plaintiffs'

counsel, and that, therefore, those counsel should not be compensated. The Court finds this argument to be incorrect. As Defendant recognizes, fees are awarded to parties who represent otherwise unrepresented interests in a lawsuit. For example, if the Justice Department adequately represents an intervenor's interests in a declaratory judgment suit under § 5, the intervenor may not receive attorney's fees. Yet, such is not the case before the Court. No evidence in the record indicates that the Justice Department pursued a course of action that represented Plaintiffs' interests. Indeed, the Justice Department as intervenor was obligated only to fulfill that responsibility and was not representing the Plaintiffs. The Court is persuaded that Plaintiffs performed all the essential tasks in the litigation at bar and then were joined at the eleventh hour by the Department. That late entry did not signal that the "cavalry" had arrived and Plaintiffs could relax. Every indication is that Plaintiffs made their own case even after the Department of Justice arrived, and that the Department did not actively represent the Plaintiffs.

In sum, the Court finds little credibility in the reasons other than the Plaintiffs' litigation that the City gave for the adoption of single-member districts. Former City Attorney Jonathan Day, Fred Hofheinz, and Judson Robinson all testified that the Department of Justice's actions caused the City to adopt the single-member district plan, (Tr. vol. 8, p. 88 (Day); Tr. vol. 8, p. 116 (Hofheinz); Tr. vol. 8, p. 172 (Robinson)) but each missed the real point: that is, that it was the actions of the Plaintiffs in litigating the matter that brought the Department of Justice to the point where it could pressure the City.

III The Plaintiffs' litigation was a substantial catalyst for the City's changes in the method of electing City Council persons.

The Court considers for four reasons that Plaintiffs have proved that their litigation was the catalyst that moved the Department of Justice to press the City for adoption of single-member districts. The Court will discuss each of these reasons separately.

The first of these reasons concerns the public and single-member districts. The cases helped educate the public, which ultimately had to approve any City charter change to adopt a single-member district plan. As both former Mayors Hofheinz and McConn testified, the public until the late seventies was basically unaware of the dilemma in which minorities were placed because of the at-large election of City Council members. (Tr. vol. 8, p. 129 (Hofheinz); Tr. vol. 9, p. 187 (McConn)) The actions of the Plaintiffs in bringing their cases opened the public's eyes to the problems which minority candidates faced. Further, the issue of single-member districts was politically sensitive in Houston, as Mayor Hofheinz testified. Consequently, it was expedient for Houston's political hierarchy to allow the Plaintiffs to provide the impetus for single-member districts, rather than having to take the political heat themselves. (Tr. vol. 8, p. 121) Finally, the issue of single-member districts was of great interest in many localities during the relevant time period. (Tr. vol. 8, p. 118; Tr. vol. 9, p. 185) However, it took the Plaintiffs to bring about some sort of change. The City administrators, although they have subsequently professed to have favored single-member districts, were unable to bring about change by themselves.

The second set of reasons which persuade the Court that an award of attorneys' fees is appropriate concerns the actions of the City of Houston itself. For example, contrary to other representations made in testimony, former City Attorney Collie stated that he felt that the Plaintiffs would keep on filing law suits until the City adopted single-member districts. (Tr. vol. 10, p. 108) This persistence in prosecuting expensive law suits can only have moved the City to accede to the Plaintiffs' wishes. In addition, the City itself kept the records of the three cases and much of the material given to the Department of Justice together, in other words, the City recognized the commonality of the cases and the work that went to the Department of Justice. (Tr. vol. 7, p. 56) Moreover, when the Department of Justice asked the City for supplemental information in support of the submission, the Department of Justice received materials from 73-1650, such as the study done by Dr. McManus of the University of Houston (Tr. vol. 10, pp. 48-49), and the appellate briefs in 73-1650, (Tr. vol. 10, pp. 57-58), and material regarding 78-2174. (Tr. vol. 7, p. 193); Defendants' Exh. 2. Finally, even officials who testified for the City in the hearing before the Court stated that they felt that they regarded themselves as being in an adversary relationship with the Plaintiffs at the time that the City met with the Department of Justice regarding the submission. For example, former Mayor McConn stated that he felt that he and his fellow officials were competing parties with the Plaintiffs when the parties went to the Department of Justice. (Tr. vol. 9, p. 171) And Jonathan Day, former City Attorney, stated that they asked that the material in the submission be kept confidential because of the City's position as a Defendant in the 73-1650. (Tr. vol. 8, pp. 76-77) Mr. Day objected

on the ground that the material was "work product." "Work product" is by definition material prepared in anticipation of litigation, which leads the Court to conclude that the City certainly anticipated further litigation on the subject. *See* C. Wright and A. Miller, *FEDERAL PRACTICE and PROCEDURE: CIVIL*, § 2021 (1970) (defining "work product").

Third, actions of the Plaintiffs' lawyers also supports the Court's holding. For example, those persons who were enlisted by the Plaintiffs' counsels to go to Washington to petition the Department of Justice on behalf of the minority community were persons who were already heavily involved in the litigation at bar. (Tr. vol. 7, p. 63) In addition, the lawyers for the Plaintiffs testified that they considered themselves when before the Department of Justice to be acting as competing parties in an adversary process; in the lawyers' estimation, the lawyers were there representing their clients, the Plaintiffs. (Tr. vol. 5, pp. 46-47 (Greene); Tr. vol. 7, p. 173 (Korbel))

Fourth, and most important, the actions of the Department of Justice clearly indicate that, but for Plaintiffs' litigation, the Department would not have taken action against the City. The importance of the litigation is evident from many circumstances. For example, the Department of Justice closed the meeting with City officials to the Plaintiffs because the Plaintiffs and the City were engaged in an adversary process over the issues that were being discussed with the City. (Tr. vol. 7, pp. 114-15) In addition, despite protest from Mr. Collie to the contrary (Tr. vol. 9, pp. 238-39), there are many indications that the cases against the City over single-member districts were discussed at length during the City's meeting with the Department of Justice. (Tr. vol. 7, pp. 72-

78, 115) Moreover, there would have been an election were it not for the injunction that was issued in the Plaintiffs' case, 78-2174. (Tr. vol. 5, p. 123)

The most significant contemporaneous sign of how the litigation caused the actions of the Department of Justice to object is the Department's obvious and heavy reliance on the information Plaintiffs gathered for their lawsuits. (Tr. vol. 10, pp. 58-59) A letter dated June 11, 1979, from the Department indicates that the Department of Justice used this information. (Tr. vol. 9, p. 243) Furthermore, the circumstances surrounding the Department of Justice's objection clearly point to their heavy reliance upon the Plaintiffs' information.

The Department of Justice used some of the information that was obtained by the Plaintiffs in litigation before the Department's objection was made. Some of the information was used in regard to the *amicus* brief filed by the Department of Justice in 73-1650, on appeal with the Fifth Circuit. For example, Al Greene testified that he went over the exhibits in 73-1650 with Miriam Eisenstein, the lawyer for the Department of Justice who was drafting that brief. (Tr. vol. 5, pp. 52-53) Ms. Eisenstein appeared to have only the information from 73-1650 and no information from the Department of Justice regarding that case. (Tr. vol. 4, pp. 142-43) That indicates to the Court that the Department had little information of its own on Houston.

From the outset, Al Greene and other Plaintiffs' attorneys put a great deal of effort into keeping the Department of Justice apprised of the situation. Mr. Greene wrote the Department of Justice, asking them to enforce the Voting Rights Act in Houston before filing 78-2174.

(Tr. vol. 8, pp. 51-52) After the case commenced, the Plaintiffs still kept in contact with the Department of Justice. Mr. Greene, for instance, followed up on information he had begun sending the Department in 1976 by sending Dr. Davidson's book (Tr. vol. 4, pp. 170-71) without directly making overtures to the Department to take any particular action in Houston. Mr. Greene also told the Department of Justice about the imminent City election in July, 1979. (Tr. vol. 5, pp. 122-23) Numerous meetings and telephone conversations were had between the Department of Justice and Plaintiffs all the way through the process (Tr. vol. 7, p. 116), as well as five comments from Plaintiffs or Plaintiffs' representatives being filed during the relevant period. (Tr. vol. 7, p. 98) The lack of knowledge of the Department of Justice was abundantly clear to the Plaintiffs, and therefore they made every effort to see that the Department got the full facts. (Tr. vol. 7, p. 198) Most of those facts came directly from Plaintiffs' litigation.

The Department of Justice was given the full record in 73-1650 by the Plaintiffs, not just the excerpts the City had sent. (Tr. vol. 7, p. 194)[24] Two parts of the

---

24. Defendant argues that the 73-1650 record was outdated by the time Plaintiffs gave the Department the record. If that is true, the Court is at a loss to explain why Defendant also submitted parts of the record to the Department. Also, no evidence suggests that the record was in fact out-of-date.

Defendant also argues that Plaintiffs' data was neither necessary nor valid and cites a concurring opinion in *Jones v. City of Lubbock*, 730 F.2d 233 (5th Cir. 1984). The Court is unpersuaded by this argument for two reasons. First, the fact remains that the Justice Department did use the Plaintiffs' information. Second, the uncontroverted testimony before the Court indicates that the Department does indeed use the information of the ilk Plaintiffs offer in places such as Houston. The concurring opinion Defendants cite does not refer to Houston, and it is not probative in the least of error in or in uselessness of the data at hand.

record proved critical in the Department of Justice's inquiry. One key element was the Plaintiffs' development of proof of racially-polarized voting from the cases that the Plaintiffs prosecuted. This was critical to the Department in determining that an objection was warranted. (Tr. vol. 8, pp. 7-8) Racially-polarized voting, as Robert Collie stated from the stand, is a necessary component of the Department of Justice's analysis. (Tr. vol. 10, p. 106) In order to determine whether racially-polarized voting exists, one has to trace various sociological factors. Those factors include the identification of the ethnicity of precincts, made difficult by changes in the precinct's ethnicity and lack of data; an analysis of various races, including finding the race of candidates and the voting returns for each precinct, again hard to find in Houston because of lack of accurate data and poor record-keeping; computation of the findings; and creating an array that would make those findings meaningful. (Tr. vol. 3, pp. 160-71) The Plaintiffs prepared one such extensive study in 73-1650. It took them months to complete this effort. (Tr. vol. 3, p. 166) Undoubtedly, it would have taken the Department of Justice a similarly long, if not longer, time to perform the same tasks, given the lack of manpower and lack of familiarity with the area. The Plaintiffs' expert, Mr. Garza, stated that in his opinion the Department of Justice could not have done the studies that were necessary without prior records and that the Department of Justice only had sixty days in which to compile its information. (Tr. vol. 1, pp. 108-09) By way of comparison, the Court was apprised that studies by MALDEF regarding Bexar County hispanics, some 830,000 people, took a staff of five persons working full-time much longer than sixty days to compile. (Tr. vol. 6, p. 80) Using the Plaintiffs' figures, the Depart-

ment of Justice found, contrary to the assertions of the City of Houston, that there was racially-polarized voting in the City; in fact, the Department found that there was severely racially-polarized voting in Houston. (Tr. vol. 3, pp. 169-71; Tr. vol. 10, p. 52) Based in part on this finding of racially-polarized voting, the City of Houston's annexation of predominantly white areas was determined by the Department of Justice to violate the voting rights of minority citizens of Houston. (Tr. vol. 7, p. 197)

The other significant identifiable contribution of the Plaintiffs' materials to the Department of Justice's efforts were the contributions of the witnesses which the Plaintiffs identified for the Department of Justice. Primary among those was the work of Dr. Chandler Davidson, a professor at Rice University and expert in demographics and voting rights. Dr. Davidson who, had testified for the Plaintiffs in the hearing before the three-judge panel in 1978, helped compile valuable information on racially-polarized voting. (Tr. vol. 4, pp. 56-57)

Dr. Davidson's background in racially-polarized voting studies, such as the work he did for his book *Biracial Politics,* was essential to Plaintiffs' cases and, later in the analysis of the Justice Department.[25] Dr. Davidson testified that he had numerous contacts with the Department of Justice personnel. For example, he discussed racially-polarized voting in Houston with Assistant Attorney General for Civil Rights, Drew Days; he also talked with David Hunter, Gerald Jones and Ms. Eisenstein, all of whom were working on the submission from

25. The Court notes that Dr. Davidson did not bill for any of the time that he spent working on his book. (Tr. vol. 4, pp. 29-30)

the City of Houston at the Justice Department. (Tr. vol. 4, pp. 30-44) Indeed, at the request of the Department of Justice, Dr. Davidson submitted a comment on the electoral analysis prepared by Dr. Susan McManus which the City tendered in support of its submission. (Tr. vol. 7, p. 98; Tr. vol. 4, pp. 33-34) The basis for his comment was the work he performed for Plaintiffs for admission as exhibits and/or testimony in their litigation challenging the at-large system of City Council elections.

Defendant advanced an argument that should be discussed here. The City contends that 75-1731 and 78-2174 were brought under § 5 and that under § 5, courts may not order changes in electoral practices. Counsel for Plaintiffs would seemingly agree. *See* testimony of George Korbel (Tr. vol. 6, p. 66):

> If they make a determination the change is required to be precleared, then the only power that the three-judge court in the jurisdiction, the local jurisdiction, has is to enjoin the activity until the Department of Justice has had an opportunity to consider clearance and actually give clearance or until the jurisdiction has filed a lawsuit in the District of Columbia and received a declaratory judgment action; and that also requires a three-judge court.

However, that does not change the Court's conclusion that the Plaintiffs were prevailing parties. First, the complaints in both cases also alleged causes of action under the Constitution, which could easily be construed as requesting relief that includes the imposition of election by single-member districts. Moreover, the fact that the Justice Department mooted the claim by forcing the City to adopt single-member districts does not vitiate Plaintiffs' lawyers' claims, given the contributions those lawyers

made to the Department's decision-making process. In addition, even if one only considers the § 5 claims, the fact remains that Plaintiffs got what they prayed for, single-member districts, despite the fact that the Court could not order adoption of those districts under § 5. If, in another context, a plaintiff's lawyer brought a suit on one ground, prayed for relief on it and then, on another, unstated ground, got all the relief that he requested, the lawyer presumably would receive an award on the basis of whatever his client received and not on what he stated as a basis for relief. The Court also notes that Mr. Garza testified that until 1975, the question of whether substantive as well as injunctive relief was available under § 5 remained open. (Tr. vol. 1, pp. 81-82) Finally, meriting attention as well is the fact that the Plaintiffs were heavily involved in drawing the actual plan that went to the voters. (Tr. vol. 9, p. 226) Clearly Plaintiffs and Plaintiff's witnesses such as Ben Reyes, Dr. Davidson, and Dr. Richard Murray discussed the drawing of plans with the Department of Justice (Tr. vol. 6, p. 31), as did Al Greene. (Tr. vol. 6, pp. 17-18) Much of the concern appeared to center about the use of outdated data by the City in drawing up the plans. (Tr. vol. 4, pp. 43-45) While the contents of many of the conversations are not available to the Court, many notations made during the meeting indicate that reference was often made to the Plaintiffs in discussions between the City of Houston and the Department of Justice. (Tr. vol. 7, p. 117)

The City's representatives also met several times with Plaintiffs and Plaintiffs' counsel. The City offered testimony to the effect that these meetings were merely normal meetings with constituents (Tr. vol. 9, p. 212; Tr.

vol. 10, p. 119) like the public and private meetings of the nature had with many other persons who were not affiliated with the lawsuits (Tr. vol. 6, pp. 36-37) or that they were meetings encouraged by the Department of Justice to be had with all community leaders (Tr. vol. 10, p. 109). The City's witnesses also contended that the meetings were in any event, unspecific and not about particular plans. (Tr. vol. 10, p. 111) Undeniably, however, many meetings were had with Plaintiffs, for example, with Ben Reyes and Mickey Leland (Tr. vol. 9, p. 210), with E.M. Knight and members of the GHCCO (Tr. vol. 9, pp. 211-12) and between Reyes and the City's expert who was drawing up the plan. (Tr. vol. 7, p. 121) That those meetings were more important than meetings had with other persons is evidenced by the fact that the meetings greatly affected the plan that the City ultimately submitted to its voters. Many plans were suggested or were in fact scrutinized during the period. (Tr. vol. 3, p. 136) However, evidence in the records indicates that several suggestions made by the Plaintiffs were adopted and incorporated into the final plan. For example, the escalator clause, which allows for expansion of the City Council and the number of districts as the City grows, is directly attributable to the influence of the Plaintiffs (Tr. vol. 7, pp. 119-20); in addition, the City made concessions to Plaintiff Ben Reyes regarding the drawing of lines for different districts. (Tr. vol. 9, p. 169)

Related to this argument is the City's contention that the Plaintiffs did not prevail because they wanted all City Council members to be elected from single-member districts, and what they ended up with was a mixed system of single-member and at-large elections. This argu-

ment is without merit for two reasons. First, the Plaintiffs certainly gained tremendously from what they received in the mixed system, as now a majority of City Council members run for election in single-member districts, and minorities gained seats on the Council. Before institution of election by single-member districts, several minority candidates had run for city office and, while winning the minority vote, lost city-wide. (Testimony of Dr. Davidson in 73-1650, vol. V at 22-25) Before single-member district election, only one black and no hispanics had been elected to the City Council; now four minorities (three blacks and one hispanic) sit on it. (Tr. vol. 7, p. 128) Given that the black and hispanic population of Houston alone would make it the fourth largest city in Texas, the achievement is significant. (Tr. vol. 7, p. 126) According to the 1970 census, Houston was 26% black and 12% hispanic, for a total of at least 585,000 minority citizens. In fact, the number of City Council members was increased to allow for the new office-holders from single-member districts, which arguably increased the impact of the new system in favor of minorities. It is well established that Plaintiffs need not obtain all relief they have requested in order to be prevailing parties. *Marion v. Barrier*, 694 F.2d 229, 231 n. 1 (11th Cir. 1982) (*per curiam*), *citing Knighton v. Watkins*, 616 F.2d 795, 799 (5th Cir. 1980).

In sum, the Court finds it clear that the Plaintiffs' litigation was absolutely critical to the Department of Justice in the Department's determination to object to the City of Houston's submission. Without the information and aid of the Plaintiffs, the public and the Department would not have been willing to go forward with the type of reform that was ultimately made. The Court

cannot separate the Plaintiffs' functions as political figures and litigants. The two roles are inextricably intertwined, and the Court sees no reason to deny attorneys' fees to a lawyer who worked long and hard on extremely difficult and emotion-charged issues simply because some of their clients had political affiliations and offices. What is important is that although some of the Plaintiffs were political figures, as litigants they are entitled to have their attorneys' paid if they are the prevailing party which they clearly were. And the Court considered the work done for litigation that is used in another forum, the action of which moots the litigation compensible. *See* discussion *supra* of *Webb* and *Gerena-Valentin; see also Sullivan v. Commonwealth of Pennsylvania Department of Labor and Industry, Bureau of Vocational Rehabilitation*, 663 F.2d 443, 445 (3rd Cir. 1981) (attorney's fees awarded to counsel whose efforts in prosecuting Plaintiffs' Title VII suit "were a material factor" in Plaintiffs' obtaining the relief sought in arbitration). Defendants assertion that Plaintiffs' actions had to lead "inexorably" to the Justice Department's actions is incorrect. What else might have happened is irrelevant. The point is that the Plaintiffs' lawyers' actions did lead to the Department's decision. *Criterion Club of Albany v. Board of Commissioners of Dougherty County, Georgia*, 594 F.2d 118, 120 (5th Cir. 1979) (per curiam) supports the Court's conclusion. In *Criterion Club*,

> the plaintiffs brought a class action on behalf of the black residents of Dougherty County, Georgia, against that county's Board of Commissioners, alleging that the county-wide, at-large system of electing the Board abridged their fourteenth and fifteenth amendment rights. The case never proceeded to trial.

> Instead, the parties reached an agreement pursuant to which the Dougherty County legislative delegation introduced a bill in the Georgia General Assembly redistricting the county and providing the opportunity for the election of at least two blacks to the County Commission. The bill passed and was signed by the Governor. The district court denied the plaintiffs' application for section 1988 attorneys' fees. The Fifth Circuit remanded the case to the district court with the direction that if the district court found that the legislative changes that occurred were a consequence of the filing of the plaintiffs' suit by way of a compromise or other agreement of the parties, then attorneys' fees should be awarded.

Sullivan, 663 F.2d at 449. Presenting the bill to the General Assembly did not "inexorably" lead to passage of the bill, as the Assembly could have voted the legislation down. Yet, once the Assembly passed the bill, attorneys' fees were available for prosecuting the case that caused the bill to go to the Assembly. *See also Hardy v. Porter*, 613 F.2d 112, 114 (5th Cir. 1980) (lawyers should be compensated for work done on unsuccessful issue in litigation when work aids in prosecution of successful claim).

IV. The Amount of the Attorneys' Fee Award

Having determined that the Plaintiffs' lawyers are entitled to an award of fees, the Court must decide how much compensation each lawyer should receive. As indicated in the discussion of the law above, the Court considers that it first must examine the *Johnson* factors and then decide whether a multiplier should be used. The

Court therefore turns to the *Johnson* factors. Initially, the Court will discuss the factors applicable to the case generally, such as the general level of the skill required to prosecute the action and the novelty of the issues presented. Then the Court will apply the factors that relate to each individual attorney, *e.g.*, his particular qualifications, his professional hardship in taking the case, and the reasonableness of the numbers he spent on the tasks in the litigation.

Several *Johnson* factors concern the case itself. The first factor to which the Court turns is the general level of skill of the attorneys involved.[26] The Court is convinced that a high level of skill was necessary in the litigation under consideration. For example, 73-1650 required a tremendous amount of work and skill to put together a constitutional challenge based on massive amounts of raw data compiled into statistics. And the litigation under the Voting Rights Act also was very complex. Normally, as explained above, litigation under Section 5 is not overly complex. But in the case at bar, the newness of the extension of the Voting Rights Act to Texas and the dearth of attorney information and knowledge regarding extension of the statute complicated the case. (Tr. vol. 5, pp. 3-4) The Court is persuaded from the testimony and a review of the record that the attorneys for the Plaintiffs were quite skillful. The lawyers made a good showing on a bare budget in an extremely difficult case, and the Court is convinced that the quality of representation was quite high. (Tr. vol. 7, pp. 140-41) The Court considers in particular that Mr. Kor-

---

26. Specific skills of each lawyer will be discussed *infra*, as well as the time each lawyer spent on the cases.

bel's and Mr. Botello's knowledge of the Voting Rights Act and ability to locate expert witnesses was outstanding. (Tr. vol. 3, p. 89; Tr. vol. 5, pp. 7-8) In addition, the exhibits that were put together for 73-1650 showed a high degree of skill and professionalism. (Tr. vol. 5, pp. 4-7)

Another factor which the Court must take into account under *Johnson* is the speculative nature of the case, and the cases at bar were indeed speculative. Initially, the cases were speculative from a legal point of view because the litigation's outcome was so uncertain; in other words, given the resources available to the Plaintiffs relative to the resources available to the other side, plus the novelty of many of the questions presented, *see infra,* the cases can at best be called highly speculative. Then too, the cases were speculative in nature because, as Mr. Dippel pointed out, there was no fixed fee involved for the attorneys. Thus, the cases were speculative from a professional nature because the lawyers who represented the Plaintiffs were unsure whether they would be paid (Tr. vol. 1, pp. 129-30) and, if they were paid, they had no set hourly rate for which they had contracted.

Results obtained also justify an award of attorneys' fees. As Mr. Dippel stated in testimony, the main value of litigation is getting for the client what the client wants. (Tr. vol. 2, p. 53) Although initially disappointed by the outcome of the trial of 73-1650, (Tr. vol. 2, p. 127), the Plaintiffs ultimately were satisfied because Houston adopted single-member district election of City Council members. (Tr. vol. 5, p. 19) Houston's large size and prior unwillingness to change to single-member district

elections especially made this change an important accomplishment. (Plaintiffs' Exh. 50)

Efficiency also was a hallmark of Plaintiffs' preparation of their case. The City admits that the average time claimed to have been expended is not unreasonable. Its witness, Mr. Cooper testified that the time record for the preparation and prosecution of the case does not appear to be unreasonable. (Tr. vol. 9, p. 67) As Mr. Cooper pointed out, expertise in a particular type of litigation will increase the efficiency of the pursuit of that litigation. (Tr. vol. 9, pp. 120-21) The Court is persuaded that the expertise of the Plaintiffs' attorneys had that effect in the cases at bar. For example, when there were only a few attorneys working on the case, and those attorneys realized that the case had grown too large for them to handle, they called in other attorneys; however, they called in only a small task force to allow them to do their work efficiently and without duplication. (Tr. vol. 4, pp. 173-80) Another example of the efficiency that Plaintiffs' attorneys manifested was to use informal discovery in 73-1650, substantially reducing the cost to themselves and the City (and ultimately the taxpayers) of undertaking a massive case. (Tr. vol. 8, p. 8) In addition, the Court has examined the various fee petitions submitted and determined that the Plaintiffs spent minimal hours on their briefing and made good efforts to efficiently distribute their time among the various tasks needed. (Tr. vol. 3, pp. 38-41) Finally, the Plaintiffs' attorneys used their expert witnesses prudently. The use of Dr. Charles Cottrell of San Antonio provides a good illustration. Dr. Cottrell was going to testify for the Plaintiffs, but the Plaintiffs' attorneys decided shortly before trial that Dr. Cottrell would not be needed. Instead of

asking Dr. Cottrell to stay just in case he was needed, the attorneys sent him home. (Tr. vol. 7, pp. 141-42) Another factor justifying an award of attorneys' fees in the instant case is the lack of duplication which is manifested in these cases. As one witness, Mr. Dippel noted, there is no discernible duplication of efforts among the attorneys present in the record. (Tr. vol. 2, pp. 72-73) As Plaintiffs' attorneys emphasized, they had no incentive to duplicate efforts; in fact, the large amount of work to be done by relatively few people made it imperative that all tasks be split up and performed as efficiently as possible. (Tr. vol. 3, pp. 14-15; Tr. vol. 7, p. 139) The lawyers avoided duplication by splitting up tasks daily (Tr. vol. 7, p. 139) at meetings held in Mr. Greene's office. At these meetings, the attorneys discussed the case, apprised each other of what they had done, and apportioned the tasks among themselves. (Tr. vol. 3, p. 14) Examples of the lack of duplication in the case proliferate in the record, four sufficing to prove the Court's point. First, the attorneys in some sense divided the clientele among themselves in order to work more efficiently with them. For example, Mr. Washington and Mr. Greene particularly focused on the black Plaintiffs and the black interests in the case. The other attorneys spent more time with the hispanics and involved in the hispanic questions. (Tr. vol. 2, p. 109) Although these divisions were not rigid, they did allow for division of authority and responsibility among the lawyers; also, they allowed the varying interests of different ethnic groups to be fully represented. (Tr. vol. 7, pp. 148-49) A second example is how witnesses were found and prepared. One of the Plaintiffs, Ben Reyes, helped track down expert witnesses to be examined for possible use

at trial. Mr. Reyes and Mr. Botello would then perform intermediate tasks such as initially interviewing the experts and arranging for studies. George Korbel would finally conduct a second interview with witnesses that might be used and then decide if the witnesses would indeed be asked to testify. (Tr. vol. 7, pp. 139-40) Third, the lack of duplication was further manifested in the briefing process. For example, for the initial appellate brief, Mr. Greene procured the record and outlined the record. Mr. Korbel, taking that outline, went through the transcript and drafted the brief. The brief was then subjected to the scrutiny of the other attorneys. (Tr. vol. 8, pp. 3-4) For the reply brief, a similar process was used. Mr. Korbel prepared the first draft, and Mr. Greene revised it. (Tr. vol. 5, pp. 103-05) Fourth, Plaintiffs' lawyers avoided duplicate efforts at trial. Examples of this lack of duplication are that attorneys cross-examined the persons for whom they considered this would be the most effective.[27] *See* Mr. Washington's examination of Judson Robinson, discussed *supra* and the use of different lawyers to cross-examine and brief witnesses during trial. (Tr. vol. 3, p. 57)

The final factor which the Court finds relevant to the case under *Johnson* is the novelty and difficulty of that case. The Court has examined seven circumstances that made the questions in the case before the Court par-

---

27. At the hearing on attorneys' fees not all of the petitioning lawyers asked questions. This does not indicate that those lawyers need not have attended. Each lawyer has his own petition with its own merits, and the lawyers therefore have the right to full representation at the hearing. The Court appreciates lawyers not asking questions if the matter has been fully covered and they have nothing to add. This is an example of efficient use of attorney time and an appreciation of the Court's time constraints.

ticularly novel and difficult from the Plaintiffs' attorneys' standpoint.

Often, the quality of the Defendants' lawyers' work was quite high, requiring significant efforts from the Plaintiffs' attorneys' to meet the challenge, which they did. (Tr. vol. 3, pp. 16-17) In addition, the time pressures on the Plaintiffs' attorneys' were great. As Mr. Greene explained, some of the time pressures were caused by circumstances alone. Plaintiffs wanted relief as soon as possible, and frequently made this abundantly clear to their attorneys; often the Plaintiffs' attorneys received very short notice on settings; and, in 75-1731 and 78-2174, the issues involved had to be resolved before the elections involved occurred. (Tr. vol. 5-17) Another time factor was that the City would often delay in giving its submissions to the Department of Justice, and then send in massive amounts of information and request expedited consideration of their submissions. Consequently, the Plaintiffs had little time to consider and respond to the submissions. (Tr. vol. 5, p. 49) Still another factor increasing the difficulty of the cases at bar for Plaintiffs' attorneys was the slim budget on which the cases were prosecuted. Mr. Korbel noted during the hearing that the litigation budget had "the least" funds of any budget in any litigation in which he had been involved. (Tr. vol. 7, p. 170) And, examining the record, the Court agrees that the Plaintiffs' resources were slim both in terms of manpower and money. Admittedly, some organizations and individuals gave money for the prosecution of this case. For example, a small contribution came from Lawrence Pope (Tr. vol. 4, p. 164), and there was some help from the N.A.A.C.P. Legal Defense and Educational Fund, Inc. (Tr. vol. 3, p. 37) In addition, a single-

member district defense fund raised two thousand dollars ($2,000) to three thousand dollars ($3,000) to pay for the record that was used in preparing the Fifth Circuit brief in 73-1650. (Tr. vol. 4, p. 164; Tr. vol. 7, p. 136) The Court also notes that one of the Plaintiffs, Ben Reyes, paid for Mr. Korbel's plane ticket to Washington when Mr. Korbel went to speak to the Department of Justice. (Tr. vol. 8, pp. 33-34) However, such isolated and limited contributions in no way covered the expense of this large case. No organization systematically funded this lawsuit (Tr. vol. 7, p. 136), principally because the resources of organizations normally appealed to in such cases were overextended. *Id.* For example, MALDEF could not fund 73-1650, as the organization was busy itself and had little to share with the Plaintiffs. (Tr. vol. 3, pp. 106-07) In sum, the expenses for the cases in large part came out of the pockets of the Plaintiffs' lawyers. One graphic illustration is that Mr. Korbel and Mr. Greene paid the expenses of Dr. Charles Cottrell and one of the other expert witnesses out their pockets when no other money could be found. (Tr. vol. 8, pp. 6-7)

Difficulty also arose for the Plaintiff's lawyers because of the cases' racial overtones, and the City Attorney who led the City's defense at the trial of 73-1650 and who later oversaw the briefing in the appellate court was a black person, Otis King. (Tr. vol. 3, p. 18; Tr. vol. 8, p. 57) Complications also arose because of the racial nature of the case when the City moved to recuse this Court from hearing the attorneys' fees matter because of the Court's alleged membership in the class in one of the cases; the recusal motion made the case lengthier and more difficult for the Plaintiffs' attorneys. The Court is unpersuaded by the City's argument that hours Plain-

tiffs' lawyers spent on the recusal motion and the subsequent unsuccessful petition for writ of mandamus should go uncompensated. Maintaining the forum to which the case was originally assigned was crucial to avoid delay, (Tr. vol. 5, pp. 19-20) even the City's expert, Mr. Cooper, testified that he would have billed for hours spent opposing recusal. (Tr. vol. 9, pp. 109-10)

The difficulty of the case can also be attributed in part to the novelty of many of its elements. (Tr. vol. 2, p. 77) The Court has pinpointed five issues the City raised which lengthened and complicated the litigation at bar. These issues are: whether a jurisdiction can be enjoined to submit to the Voting Rights Act (Tr. vol. 7, pp. 22-23); what constitutes an election (Tr. vol. 7, p. 23); whether the City was covered by the Voting Rights Act (Tr. vol. 7, p. 22); the parameters of the intent element under the Voting Rights Act (Tr. vol. 7, p. 21); and whether a city can flout, as Houston did, its promise to a three-judge panel to inform that panel of any upcoming election which might violate the Voting Rights Act (Tr. vol. 7, pp. 23-24)

The Court also finds justification for an award of fees in the sheer size of the cases. That size is manifested in four ways. First, the huge record, which does not even include all the material Plaintiffs collected in preparation for trial, illustrates graphically how enormous and difficult an undertaking the cases were. (Tr. vol. 7, p. 24) Moreover, the length of trial as compared to other similar types of cases reveals the nature and complexity of the cases at bar. Three days of trial, for instance, were needed to hear the Bexar County case under the Voting Rights Act; five and a half weeks of trial were necessary for 73-1650. (Tr. vol. 2, p. 162) That the City used 19

attorneys also indicates that the case was a large and complex one. (Tr. vol. 8, pp. 58-59) Finally, the numbers of experts used clearly shows that the case was one of no ordinary size. The City's witness, Mr. Collie, acknowledged that the case demanded expert testimony. (Tr. vol. 10, pp. 41-42) The extensive use of experts and of other persons with specialized knowledge is graphically illustrated by what the City spent on expert witnesses. The City of Houston spent over $255,000 in the cases at bar on expert witnesses (Plaintiffs' Exhibit 17) which was eighteen times higher than the amount of fees it had for expert witnesses in any other single litigation prior to the trial of 73-1650. (Tr. vol. 7, p. 133) And the City called on many of its own personnel to testify in their areas of expertise; all the City's department heads testified regarding the responsiveness of their departments to the minority community. (Tr. vol. 5, pp. 3-4) And, of course, the Plaintiffs' experts cannot be discounted. The Plaintiffs, with their lean budget and meager resources called 8 expert witnesses and utilized more in preparation for the case. (Tr. vol. 7, p. 25)

The secrecy with which the City of Houston cloaked many of its movements also complicated the case. One illustration of such secrecy has already been adverted to: the City requested that the Justice Department close the meeting between Houston officials and the Department in 1979. Closing such a meeting is unusual. (Tr. vol. 6, p. 78; Tr. vol. 7, p. 101) The closing of the meeting hindered the efforts of the Plaintiffs to find material which they needed. The City also lacked openness and candor in discovery. (Tr. vol. 9, p. 100) Cooperation can cut costs of discovery (Tr. vol. 9, p. 100), *e.g.*, when one receives data from a public record instead of

having to go through the subpoena or discovery process, expenses are shaved. (Tr. vol. 1, p. 125) However, in several instances, the Plaintiffs were forced into protracted legal maneuvers in order to obtain materials they needed. For example, the City refused to tender voluntarily its equal employment opportunity data, and those records had to be subpoenaed. (Tr. vol. 4, pp. 90-91) More importantly, Mr. John Whittington, an Assistant City Attorney, had removed from the public records official election returns for the City of Houston. (Tr. vol. 7, pp. 24-25) The Plaintiffs wished to procure these figures in order to check the figures against the unofficial ones which their experts had been using, insuring the accuracy of the exhibits that the Plaintiffs would prepare. (Tr. vol. 8, p. 10) However, the City removed the records, and only an opinion from the Texas State Attorney General under the Open Records Act of Texas gave the Plaintiffs access to that material. (Tr. vol. 4, pp. 176-81) The delay caused by the City's action meant that the Plaintiffs' attorneys only got the records a few weeks before trial, thereby increasing the time pressure. (Tr. vol. 4, p. 181) Such actions by the City of Houston are deplorable. Yet another instance in which the City obviously used a campaign of secrecy in regard to the Plaintiffs' attorneys concerned the submissions under the Voting Rights Act. When the Voting Rights Act was made applicable to Texas in 1975, Congress ordered that it be retroactive to 1972. In other words, the City of Houston had to file submissions regarding election changes between 1972 and 1976. (Tr. vol. 7, p. 30) The City prevailed upon the Department of Justice to refuse to tender copies of the public submissions to the Plaintiffs. This procedure is, Mr. Korbel testified, relatively unusual. (Tr. vol. 7, pp. 28-30) The Plaintiffs attempted

to circumvent the Department and the City by subpoenaing those who had prepared the submissions, but those subpoenas were quashed. (Tr. vol. 7, pp. 31-32)

Finally, the City made the cases more difficult than they would have been otherwise by reneging on an attempted settlement during a hearing before this Court on June 18, 1984. At that hearing, the Court denied the City's Motion to Recuse. The City and the Plaintiffs' lawyers announced after the lunch recess that the parties had settled the question of fees. (Tr. of Proceedings of June 18, 1984 hearing, p. 2) However, the City abruptly rejected the proposed settlement after filing a mandamus action in the Fifth Circuit to force the Court to recuse itself. Apparently, Mr. Whittington never recommended settlement to the City Attorney, contrary to his promise in Court to do so. (Tr. Vol. 7, pp. 155-58) The City's own expert witness agreed one could criticize such actions. (Tr. vol. 9, pp. 102-06) It is the Court's opinion that the aborted settlement effort only protracted and complicated the case before the Court. In sum, the City's actions protracted and made more difficult the final resolution of this case. The Plaintiffs' attorneys are entitled to be paid for being subjected to this conduct. Unfortunately, it is the taxpayers who will have to pay the bill for these stalling tactics by the City Attorney's office and whoever issued the "marching orders."

Defendants contend that Mr. Korbel testified on matters going to the question of whether Plaintiffs were prevailing parties, and should therefore not be compensated for all the time he spent after the need for his testimony became apparent. Defendant cites State Bar Rules DR 5-102 in this regard. DR 5-102 mandates that when an attorney knows that he ought to be called as a witness

in a case, he must cease to represent parties in that case unless the attorney is to testify on formal or uncontested matters or withdrawal would work a substantial hardship on the client. The Court disagrees for two reasons. First, the Court considers that DR 5-102 is not applicable, as Mr. Korbel's testimony only dealt with the attorneys' fees portion of the case. The merits of the case at bar have long been settled. The fact that only fees were in question makes a difference because Mr. Korbel testified at a time when he was in essence representing himself—as attorneys normally do during fee request proceedings. *Compare Rybicki v. State Board of Elections of the State of Illinois,* 584 F.Supp. 849 (N.D. Ill. 1984) (lawyers who first represented Plaintiffs and then testified on merits not entitled to fees for periods after lawyers knew they would have to testify). Moreover, even if DR 5-102 does apply, the Court considers that Mr. Korbel should be exempted from its strictness under exception two. To engage another attorney to represent the party currently in interest, Mr. Korbel himself, would be expensive, would delay the case, and would make unavailable to Mr. Korbel's new lawyer and his fellow lawyer the wealth of information and expertise someone involved in the entire litigation effort could bring to the issue.

Defendant also argues that Plaintiffs' lawyers should not be compensated at current prevailing rates for all work performed. Defendant suggests that instead the Court should compensate the lawyers at rates appropriate for the times at which they performed the work for which they were being paid. The Court declines to follow this suggestion. First, the City provides no authority in support of its unusual proposal. Second, the City's plan would not compensate for the delay in payment Plaintiffs'

lawyers have borne. "Attorneys should not be forced to discount their services by receiving payment that does not take into account the diminution in value caused by inflation or the time value of money." Comment at 802. Courts have used current rates to compensate for the use of money which delayed payment occasions. *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1096 n. 26 (5th Cir. 1982). This case is clearly not one where the Plaintiffs' lawyers waited for the prevailing rate to rise before applying for attorneys' fees, which might justify not allowing the current prevailing rate. (*See* Tr. vol. 2, p. 98) The Court, therefore, finds no reason to deviate from the accepted practice of using current prevailing rates when assessing attorneys' fees. *See, e.g., Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir. 1984); *Graves v. Barnes*, 700 F.2d at 224; *Phillips v. Weeks*, 586 F.Supp. 241, 245 (E.D. Ark. 1984); *Clarke v. Amerada Hess Corp.*, 500 F.Supp. 1067, 1075-76 (S.D. N.Y. 1980).

Having examined the factors mandated by *Johnson*, the Court turns to the matter of the records submitted by the Plaintiffs' attorneys. The Court notes that generally the City lodged two objections to the time records submitted by the Plaintiffs' attorneys. First, the City's expert in the matter, Mr. Cooper, suggested that a daily basis is inappropriate for billing, and that instead an hourly or increment of an hour system should be used. (Tr. vol. 9, pp. 60-62) The Court remains unpersuaded by this argument for two reasons. First, as Mr. Botello pointed out, the case was too all-consuming for perfect time records to have been kept, and each of the attorneys was so involved in the case that he was not splitting his time with other matters. (Tr. vol. 2, p. 188) Mr. Cooper

objected secondly to the lack of detail in many of the notations in the time records. (Tr. vol. 9, p. 123) Again, the Court is unpersuaded by this argument for three reasons. As Mr. Dippel testified, attorney's records often reflect little detail about tasks performed. (Tr. vol. 2, pp. 66-67) Moreover, as Mr. Cooper admitted, it is very possible to cheat oneself when reconstructing one's hours, from time spent, as many of Plaintiffs' counsel were forced to do. (Tr. vol. 9, p. 73) Finally, courts awarding attorneys' fees have accepted reconstructed time records as adequate proof of time spent on a case. *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102-03 (2d Cir. 1977); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Sandard Sanitary Corp.*, 540 F.2d 102, 109 (3d Cir. 1976); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 402 (D.C. Cir. 1978).

Having satisfied itself that the records themselves adequately reflect the tasks which the Plaintiffs' lawyers performed and the time those tasks took to perform, the Court turns to the elements of the different tasks which are found in the time records, and examine whether those records are properly included in charges for fees. As the City's expert, Mr. Cooper, testified, a lawyer's experience and ability decide in large part the rate which that lawyer charges. (Tr. vol. 9, p. 26) The Court recognizes that Mr. Cooper's expertise in the matter of attorneys' fees is limited, as he does not sit on any of the committees that set the fees for lawyers in the firm for which he works. (Tr. vol. 9, pp. 22-24) Firms' fees also do not always represent the time worth of the services. *See* Comment at 802 (". . . the attorney's normal billing rate may be nothing more than a starting point from which non-contingent fees are determined according to the re-

sults of the work. The hourly rate may also serve internal accounting control purposes for the firm. So the hourly rate charge is not always an accurate reflection of the attorneys worth in the marketplace." (footnote omitted)). *C.f. Blum v. Stenson*, 104 S. Ct. at 1547 n. 11. However, Mr. Cooper did outline four elements which are included in the time records which he said he would charge for, thereby supporting the Plaintiffs' claim for these fees. These elements are: 1) work in opposition to a recusal motion (Tr. vol. 9, p. 109); 2) work done during hearings on attorneys' fees (Tr. vol. 9, p. 99); 3) administrative hearings (Tr. vol. 9, p. 82); and 4) preparation of exhibits. (Tr. vol. 9, p. 112)[28] Other witnesses also testified that attorneys had billed the City equally for in-court and out-of-court time (Tr. vol. 7, p. 54), as did Plaintiffs' lawyers. Of course, an attorney who takes what he perceives to be too long on a project may well discount his or her time (Tr. vol. 2, pp. 67-68) and Mr. Cooper stated that he discounts his time if he had to wait for some time. (Tr. vol. 9, p. 116) However, there is no suggestion as to that effect in the record.

Thus, the Court turns finally to the question of the reasonableness of the hours requested for the Plaintiffs' attorneys. The Court has carefully examined the requests and reviewed the record and determined that the requests are reasonable in terms of the amounts of efforts expended and the other factors outlined above. As Mr. Korbel noted in testimony, the attorneys' fees request is unusually large compared to awards in other Voting Rights Act cases, but many of the factors that have in-

---

28. Mr. Cooper testified that he sometimes exercised billing judgment on travel time, but did not indicate when or why he did so. (Tr. vol. 9, p. 83)

flated the request have been beyond the control of the Plaintiffs' attorneys and were caused by the actions of the City and some of its attorneys. (Tr. vol. 7, p. 15) Also, the attorneys' testimony satisfies the Court that the lawyers used adequate billing judgment in instances too many to enumerate; some instances are detailed below. The Court has described above many of the reasons which it feels justify the award in the size requested. The Court would simply note two more things. First, the City's expenditures on the instant cases clearly indicate that the cases were of unusual magnitude and expense. For example, the City spent half a million dollars of staff time alone to prepare for the trial in 73-1650, not including the time spent by in-house counsel. (Tr. vol. 7, p. 57) In addition, the City spent over $250,000 for the cases in experts' fees. (Tr. vol. 7, p. 56) Second, Mr. Cooper's predictions of the correct rates and his declaration that the Court should discount the hours claimed by Plaintiffs' attorneys by ten to twenty percent due to duplication are incorrect.[29] Mr. Cooper's assessments were unhelpful in part because they were based simply on general principles, not any enumerated problems in the instant fee requests (Tr. vol. 9, pp. 80-82); *see National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1329-30 (D.C. Cir. 1982) (court need consider only specific objections to requests for attorneys' fees). And the Court finds Mr. Cooper's declarations to be of little weight because Mr. Cooper lacks familiarity with situations such as the one in the case at bar. Mr. Cooper never examined the record in 73-1650 (Tr. vol. 9, pp. 80-81), and has not been invovled in trial of a single-member district case, a case

29. The Court is mindful here of the steps described above by which the lawyers avoided duplicating efforts.

in federal court that lasted more than one day, or in a case where the outcome determined whether the Plaintiffs' attorney would be paid. (Tr. vol. 9, pp. 70-71, 87) Mr. Cooper's experience is so different from that of the Plaintiffs' attorneys that Mr. Cooper's testimony is of little aid to the Court. (Tr. vol. 9, pp. 71-72)

The lead counsel in all the cases the Court has before it was Mr. Greene. (Tr. vol. 5, p. 52) Mr. Greene put together the teams and did much of the spadework for the litigation. Mr. Greene also did the trial notebook outline for the cases, (Tr. vol. 3, p. 13), and allowed his office to be used as command post and barracks for some members of the litigation. (Tr. vol. 5, p. 43) He also wrote much of the reply brief. (Tr. vol. 8, p. 4) At the hearing on the instant motions, Mr. Greene presented Mr. Charles Dippel as a witness on his behalf. Mr. Dippel testified that Mr. Greene is a trial attorney with outstanding qualifications. Mr. Greene has been a member of the Texas bar since 1959, (Tr. vol. 4, p. 152) and was certified in 1978 by the Board of Law Examiners as an expert in civil trial law. He also teaches and has lectured and published. (Tr. vol. 1, pp. 117-18; Tr. vol. 5, pp. 108-09)

Undertaking the litigation at bar was a hard task for Mr. Greene, he experiencing many difficulties as a consequence of his employment as lead attorney. For example, Mr. Greene found the cases very hard to undertake as a sole practitioner. The case precluded all other employment during discovery and trial of 73-1650. Mr. Greene attempted to employ an associate during the relevant period of his flagging income, but the associate did not work out well. (Tr. vol. 5, pp. 41-42) Mr. Greene stated that he had virtually no income during the time the cases

were a special constraint because he was devoting all his efforts to them. (Tr. vol. 5, p. 42) Mr. Greene had no professional relationship with the Plaintiffs prior to becoming involved in the litigation (Tr. vol. 5, p. 17), and the instant cases made his finding new clients more difficult than it would have been had he not undertaken the cases. Specifically, Mr. Greene stated that the community reacted negatively to his involvement in the litigation at bar; the cases' racial overtones made the cases undesirable professionally to him. (Tr. vol. 1, pp. 133-34) Mr. Greene described the dilemma he faced to the Court: he said that whites refused to employ him because he had black clients, and blacks did not come to him because he was not black. (Tr. vol. 5, pp. 40-41)

Mr. Greene's fee agreement in undertaking the cases was that if the Plaintiffs won in the cases, Mr. Greene would request fees from the City. (Tr. vol. 5, p. 16) In regard to a fee, Mr. Greene is requesting $250 an hour, which he asserts is the customary fee for work of this type in the area. (Tr. vol. 1, pp. 135-36; Tr. vol. 5, p. 16) Mr. Greene increased the request from $150 an hour to $250 an hour after finding that rates had increased in the Houston area for work of the type that he performed. (Tr. vol. 5, pp. 65-66) He has also requested a multiplier of two. The Court considers that $200 per hour is a proper rate for Mr. Greene.[30]

30. The rates for partners in law firms in Houston with experience levels comparable to Mr. Greene's range from $165 to $250, according to evidence presented to the Court. (*See* Tr. vol. 9, pp. 30-31 ($165); Tr. vol. 2, p. 44 ($250)) The $200 figure is appropriate because it is near the high end of the market, and takes into account the quality of work in the cases and the many hours spent in performing the legal tasks involved in the cases. This fee is also reasonable in light of the fees the City has paid other lawyers to perform similar tasks. (*See* Plaintiffs' Exhibit 24)

The number of hours Mr. Greene has requested compensation for is reasonable. The Court has examined the fee request from Mr. Greene in light of the work he performed and the difficulty of the case, and agrees with Mr. Dippel that Mr. Greene's time was not excessively stated. (*See* Tr. vol. 8, pp. 4-5) Mr. Greene now keeps his time by putting the time notations on slips, which are transferred into a machine. (Tr. vol. 5, pp. 68-71) Mr. Greene bills a minimum of three-tenths of an hour for each task he performs. The Court finds this practice to be reasonable because Mr. Greene compensates by exercising billing judgment. In some instances, however, discretion as to whether to bill in days and not in specific hours is undesirable. The Court also notices that some of Mr. Greene's references are unspecific.[31] (Tr. vol. 9, pp. 65-66) However, the Court remains unpersuaded that the City has demonstrated that Mr. Greene's hours were excessive.

Mr. George Korbel also was a leading attorney in the cases before the Court. Mr. Korbel's work in the trial and before the Department of Justice were invaluable. Mr. Korbel, who had been licensed to practice law since 1968 (Tr. vol. 6, p. 42), had to spend the first three weeks of his participation reading and doing background research on the situation in Houston (Tr. vol. 7, pp. 165-66); but, once he was acquainted with the situation, he moved swiftly into the arena. In preparation for trial, Mr. Korbel provided critical help regarding the requisites of proving the disproportionate voting strength

---

31. For example, Mr. Greene's records do not always clearly explain what he was working on, and he billed for solid ten-hour days uniformly during trial rather than his actual time spent. (Tr. vol. 9, p. 65)

that at-large election of City Council members gave the majority community. Similarly, later on, Mr. Korbel gave invaluable aid regarding the legislative history of the Voting Rights Act, as Mr. Korbel is an expert in the area. Mr. Korbel's understanding of the Act was unique. At the time, only a few lawyers were experts in the area of voting rights. At the time of trial, the shortage was particularly acute in Texas, which only became subject to the Voting Rights Act in 1975. (Tr. vol. 4, pp. 162-63) At trial, Mr. Korbel was responsible for questioning witnesses he had helped locate and prepare, and did much of the briefing. Still later, Mr. Korbel dealt closely with the Department of Justice in negotiations regarding single-member districts. (Tr. vol. 7, p. 112) Ultimately, he helped draw the districts. (Tr. vol. 3, p. 137)

Mr. Korbel's professional experience eminently qualified him for the instant cases. He has much experience with class action litigation on voting rights, and has also prepared scholarly work and belonged to organizations concerned with that field. (Tr. vol. 6, pp. 50-58) As Al Greene stated, he called in George Korbel not only because 73-1650 was not a one-lawyer case, but also since Mr. Korbel's expertise in the field of voting rights made him an invaluable addition to the litigation team. (Tr. vol. 5, p. 103) Furthermore, Mr. Korbel's experience with the Department of Justice made him an important part of the team that dealt with the Department in the later stages of obtaining single-member districts. (Tr. vol. 6, p. 72)

Mr. Korbel suffered professional hardship because of his undertaking the cases at bar. Although Mr. Korbel had represented Ben Reyes, one of the Plaintiffs, since

1971 in various civil rights litigation, the fee arrangement in the instant cases was such that Mr. Korbel was not recompensed for his work. Instead, as did Mr. Greene, Mr. Korbel agreed to take only money that would come from Defendants after victory at trial. (Tr. vol. 3, p. 89; Tr. vol. 7, pp. 123-24) The cases also precluded other employment for Mr. Korbel during the relevant period. For example, the City of Lubbock was also litigating single-member districts at the relevant time. Mr. Korbel was asked to participate in that case, but declined because of his duties in the Houston case. The Plaintiffs' lawyers in the Lubbock case ultimately were awarded fees for their efforts. (Tr. vol. 7, pp. 134-35) Moreover, Mr. Korbel was asked to represent the Plaintiffs in a case regarding Victoria Independent School District. Those lawyers, whom Mr. Korbel could not join, were awarded $100,000 for their time. (Tr. vol. 7, p. 135)

Mr. Korbel has requested $250 an hour for his time (Tr. vol. 8, p. 42), although in 1978 he billed only $100 an hour in a criminal case (Tr. vol. 7, p. 33) and only $125 an hour to the City of San Antonio (Tr. vol. 7, p. 34). Mr. Korbel determined that he should ask for $250 after consulting with other attorneys and looking at surveys of attorneys' fees in the *National Law Journal*. The Court considers that $250 per hour is a reasonable rate for Mr. Korbel.

Mr. Korbel's hours are correctly stated in his time records, and will be compensated for. The Court notes with some regret that Mr. Korbel's time records are in places scant, but understands that because Mr. Korbel was only working on one case, he found it unnecessary

to keep detailed records. (Tr. vol. 9, p. 146) Mr. Korbel reconstructed most of the time records he has presented to the Court by looking at notations of time spent which he made on documents he prepared as he worked on them. Mr. Korbel changed to keeping his time records on computer in 1983, which explains the difference in notations between pre- and post-1983 records. The Fifth Circuit's Rule 47.8 requires that contemporaneous time records be presented in support of claims for attorneys' fees for work performed after January 1, 1983. The Plaintiffs' lawyers kept time records after January 1, 1983 that comport with the rule. No rule required the keeping of contemporaneous records before that date. (Tr. vol. 7, pp. 168-70) The Court finds that Mr. Korbel spent a reasonable amount of time on the cases. The City's major questioning of Mr. Korbel's hours at the hearing was to ask Mr. Korbel why he had attended the charter election which ultimately changed the charter of the City of Houston to provide for election by single-member districts. Mr. Korbel stated that he attended the election in order to be at hand if any problems had to be staved off, and the Court is more than satisfied with Mr. Korbel's explanation. (Tr. vol. 7, p. 177-78)

Mr. Jesse Botello, who has been licensed since 1976 (Tr. vol. 2, p. 146), was also a valuable member of the litigation team. For example, he came to Houston initially to assess the state of the case when Mr. Korbel was asked to join the litigation team. Once the case began in full force for him and Mr. Korbel, Mr. Botello located and helped initially prepare expert witnesses. When the case went up on appeal, Mr. Botello helped write the appellate brief. (Tr. vol. 2, pp. 180-81) In fact, Mr. Korbel brought Mr. Botello into the case because of

Mr. Botello's experience with Voting Rights Act cases. (Tr. vol. 7, p. 139) Mr. Botello is such an expert in the field of voting rights that he authored the *Handbook on the 1975 Voting Rights Act* in 1976. (Tr. vol. 2, p. 164) In sum, Mr. Botello's skills in this area are unparalleled by few lawyers in Texas. (Tr. vol. 2, pp. 162-63).

As with all the other lawyers, Mr. Botello endured personal hardship in order to represent the Plaintiffs in the cases at bar. The cases precluded his pursuing other activities that he normally would have undertaken, including accepting a Reginald Heber Smith Fellowship which he was awarded at the end of law school and taking other employment. (Tr. vol. 2, p. 163) The Court notes that Mr. Botello suffered hardship personally that the other lawyers were not exposed to. For example, Mr. Botello slept on the floor in Al Greene's office while preparing for the cases. (Tr. vol. 2, p. 183) Mr. Botello is requesting $250 per hour for his participation in the cases, which he claims to be the prevailing rate in Houston for the relevant time period. (Tr. vol. 2, p. 193) One Hundred Fifty Dollars ($150) per hour is the proper rate for Mr. Botello's services, given Mr. Botello's length of time in practice. However, the Court recognizes that length of time in practice is not the sole criterion to be considered in determining a correct fee. *See Johnson,* 488 F.2d at 718-19 ("Longevity *per se,* however, should not dictate the higher fee. If a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar.").

Mr. Botello's time is adequately stated and should be compensated for. Mr. Botello was trained in law school

to keep good time records on the work that he is doing (Tr. vol. 2, pp. 157-58, 187-88), and the Court is satisfied with the completeness and reasonableness of those time records. The City's expert pointed out that Mr. Botello sometimes billed for matters in the cases for which the other lawyers did not bill and on occasion only sketchily described his work. (Tr. vol. 9, pp. 64-65) However, the Court is convinced that Mr. Botello's records are sufficiently complete, given the circumstances under which he was working, to warrant an award of fees in the amount awarded below. Mr. Botello's explanation of his billing judgment also well satisfies the Court. For example, Mr. Botello did not take off large percentages of his time for duplication because the work was so voluminous that the lawyers had to avoid duplication at all cost, and Mr. Botello had to work very efficiently. (Tr. vol. 2, pp. 156-57) In addition, the Court takes into account that Mr. Botello discounted, as is his norm in practice, photocopying and conversations that he held with other lawyers and witnesses. (Tr. vol. 2, p. 157) Furthermore, he did not bill for his law clerk's research relevant to the cases nor the use of his photocopier. (Tr. vol. 2, p. 159)

Mr. Craig Washington, a former state representative and now a state senator, also played an active role in the litigation. Mr. Washington has been licensed since 1969. (Tr. vol. 3, p. 4) At the outset, Mr. Washington held discussions in the black community with leaders regarding the problems with at-large elections that blacks experienced. In addition, Mr. Washington had his hand in helping to select the Plaintiffs for the cases. That selection process was critical since the Plaintiffs' attorneys wished to select as Plaintiffs persons who were not vulner-

able politically or vocationally to pressures resulting from the case. (Tr. vol. 3, p. 7) During the pretrial period, Mr. Washington's main task was to help select and interview expert witnesses. For example, he worked with experts who were examining the lack of City services provided to minority communities, and worked with Dr. Chandler Davidson and other demographics experts in preparation for trial. (Tr. vol. 3, pp. 15-16) Mr. Washington also aided Mr. Greene in deciding trial strategy for the cases. Mr. Washington also discussed the merits of single-member districts with City officials, Plaintiffs and black leaders. (Tr. vol. 3, pp. 6-7) At trial, Mr. Washington's primary role was to cross-examine Judson Robinson, who was at the time the sole black member of the Houston City Council. (Tr. vol. 3, p. 13) This assignment was most important, for one of the major arguments of the City was that Mr. Robinson's election city-wide was proof of the absence of racial-polarization. The Court has found, however, that in fact his election was an aberration.

Mr. Washington was well qualified to participate in the case at bar. One of the Plaintiff's witnesses, Jose Garza, regional director of MALDEF, stated that Mr. Washington is considered to be very knowledgeable regarding matters involving voting (Tr. vol. 1, p. 71), and it was generally agreed that Mr. Washington was uniquely qualified to cross-examine Judson Robinson. Mr. Washington's unique qualifications for this task were twofold: first, he was good at cross-examination generally, and second, he was both a black and a long-time resident of the area. For this reason, he could deal with Mr. Robinson's assertions regarding the standard of living in the minority community and the responsiveness of the local

authorities to that community. (Tr. vol. 3, pp. 58-59, 84) Finally, Mr. Washington was valuable to the Plaintiff's litigation team because he was the only politician on that team, and, thus, served as a contact the black political community and as a periscope with which to survey the local scene. (Tr. vol. 3, pp. 59, 83-84)

Mr. Washington stated that the case did some damage to him economically, as it precluded other employment during the relevant periods. (Tr. vol. 3, p. 26) Mr. Washington has requested a fee of $250 an hour. (Tr. vol. 3, pp. 26-27) Mr. Washington stated that the only benefit of the suit to him was as a member of the community; he did not receive any fee for his work of the case. (Tr. vol. 3, p. 26) An appropriate rate for Mr. Washington's services is $200 per hour.

Mr. Washington also correctly seeks compensation for work on the attorneys' fees phase of the cases at bar performed by his associates on the recusal question, the Washington, D.C. law firm of Hogan & Hartson. The Court has determined that the requested fees are appropriate for these lawyers, *e.g.*, $200 per hour for the Hogan & Hartson lawyers; $85 per hour for 3.9 of Mr. Bracquet's hours and $100 for the remainder; $60 per hour for Ms. Temple and Mr. Bodie; and $135 per hour for Mr. Evans. The Court has also determined that Mr. Washnigton's requested fees for associates of his firm are appropriate. The Court considers the time records Mr. Washington kept to be adequate, and heard no serious, specific objection to the reasonableness of the number of hours for which he has requested compensation.

Finally, Frumencio Reyes participated in the case. Mr. Reyes' qualifications for this case are outstanding. He

is considered to be an excellent trial attorney, and was particularly suited to the case at bar because he is a hispanic lawyer who was a long-time resident of and well-connected in the community. For example, Mr. Reyes, who has been licensed since 1973 (Tr. vol. 2, p. 103) came into the suit because of his involvement with the Political Association of Spanish-Speaking Organizations ("PASO"). (Tr. vol. 2, pp. 112-13) Like other lawyers, Mr. Reyes suffered from taking the cases at bar. Mr. Reyes has had a professional relationship with some of the Plaintiffs in small matters since 73-1650, but at times had to drop his practice in order to meet the demands of 73-1650. He was only able to maintain a small private practice at the outset of the case and, later, had to split his days between the trial and his practice in family court. (Tr. vol. 2, pp. 122, 126) Mr. Reyes has requested $100 per hour for his services, and the Court is persuaded that that fee is reasonable, if not too low. The fee of his associate, Mr. Aldape, is correctly assessed at $100 per hour. In order to assess the time that Mr. Reyes spent on the cases, he went through the files that he had kept on the cases, saw what he did, and estimated those times that he had not marked down regarding his work. (Tr. vol. 2, pp. 129-30) The Court agrees with Mr. Cooper that Mr. Reyes' affidavit does not itemize tasks performed, which is not the preferred practice (Tr. vol. 9, p. 64); however, the Court does not consider this defect to be fatal to Mr. Reyes' fee request. The Court also considers that the requests for reimbursement of expenses are adequately documented and reasonable.

Finally, the Court must examine the question of whether the requested fees for the experts have some basis in fact. Defendants challenge the propriety of pay-

ing expert witness fees. This challenge is spurious, as established case law clearly provides that fees for expert witnesses are available, making no mention of a supposed requisite that Plaintiffs pay the witnesses and then seek reimbursement for that expense. *See Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982). Mr. Cooper objected to the attorneys' fees request for the experts, stating that an adequate breakdown of the experts' time was not available. (Tr. vol. 9, p. 67) However, the Court finds this defect not to be fatal. The breakdown provided satisfies the Court that the fees requested for the expert witnesses are adequately outlined. Once again, the City's expenditures provide some clue to the size of the task facing the expert witnesses. For example, Dr. Barton Smith, who helped the City of Houston compile some of its statistics, was alone paid at least $11,000 for his efforts. (Tr. vol. 10, pp. 34-35)[32] The absolute necessity for expert testimony has been discussed. The Court would merely note that the experts worked long and hard on the cases. For example, Dr. Davidson spent 210 hours preparing one exhibit alone, Plaintiffs' Exh. 2A (Tr. vol. 4, pp. 54-55), which illustrates the size of the effort which the Plaintiffs' experts undertook. Dr. Davidson has not been paid (Tr. vol. 4, pp. 88-89), and has requested an award of $12,000 as a reasonable fee. The Court considers that fee to be more than reasonable. Similarly, Dr. Richard Murray, an expert in voting rights who did not testify at the trial, has never been paid. Dr. Murray also has requested $12,000, a request the Court will grant.

As the Court noted in its initial discussion of the law, in some cases an upward adjustment of an attorney's fee

---

32. In contrast, Dr. Davidson and Dr. Murray have not been paid anything. (Tr. vol. 4, pp. 88-89)

is appropriate. The Court considers that, in this case, an overall adjustment for contingency is appropriate. In addition, a fee enhancement for Mr. Greene to compensate for the undesirability of the case is fitting.

At the outset, it is necessary to discuss why the factors of contingency and undesirability have been selected as bases for a multiplier. As noted above, many of the *Johnson* factors are subsumed in the calculation of the "lodestar,"[33] and all therefore not properly employed as basis for awarding a multiplier. In the case at bar, only contingency generally justifies an upward adjustment of the fees. Time and labor (factor 1) required, as well as novelty and difficulty of the questions (factor 2) involved, clearly are reflected in the number of hours spent and compensated for. Skill (factor 3), below a threshold not crossed here, preclusion of other employment (factor 4), and customary fees (factor 5) clearly factor into what hourly rate is deemed appropriate for each lawyer. Time limitations (factor 7), the lawyers' experience (factor 9) and the length of relationship with the client (factor 11) in similar cases all factor into the rate. The press of time oftentimes serves to increase a rate, while rates may be lowered for a longstanding client. Awards in similar cases (factor 12) likewise are accounted for in computing the hourly rate. Finally, results

---

33. *See, e.g., Blum v. Stenson*, 104 S. Ct. at 1548-49 (novelty and complexity of issues normally subsumed in "lodestar"); *id.* at 1549 (quality of representation and results obtained normally subsumed in "lodestar"); *see also Gillespie v. Brewer*, 602 F.Supp. 218, 228-30 (N.D. W. Va. 1985) ("lodestar" adequately compensates for all factors present in the case but contingency and undesirability of case); *Vaughns v. Board of Education of Prince George's County*, 598 F.Supp. 1262, 1283 (D. Md. 1984) (factors 1-3, 5, 7, and 9 subsumed by "lodestar" and fail to justify multiplier), *aff'd in relevant part*, 770 F.2d 1244, 1246 (4th Cir. 1985).

achieved (factor 8) appear in this case to be adequately compensated for in the lodestar. The Court is aware of the magnitude and import of the changes Plaintiffs helped to effect. But the Court is also aware that other factors besides Plaintiffs' efforts played into the adoption of single-member districts. While the case law discussed above makes it clear that entitlement to fees is not precluded by not being the sole catalyst, the Court considers that the existence of other factors that helped bring about change exerts downward pressure on the award of a multiplier.

Contingency (factor 6), though, does justify the award of a multiplier in the instant case. Not all cases that are contingent warrant upward adjustment of the lodestar. *Marion v. Barrier*, 694 F.2d 229, 231-32 (11th Cir. 1982). However, this case was contingent in a number of ways: the law was in many instances unsettled; the case preparation demanded many hours which would be compensated for only if Plaintiffs won and which could have been devoted to work that surely would have yielded a fee; and, even if Plaintiffs were successful, payment is delayed and the actual amount of the fee is subject to scrutiny by a court. The risks entailed in a case that is contingent are ones not compensated for in a flat fee, such as Mr. Cooper described, because Mr. Cooper's firm is paid by its clients whether the clients win or lose. In order to attract lawyers of quality to take risks such as those entailed in the instant cases and work to vindicate issues, a court must compensate with a contingency multiplier. *See, e.g., Craik v. Minnesota State University Board*, 738 F.2d 348, 350-51 (8th Cir. 1984) (per curiam); *Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp.*, 599 F.Supp. 509, 519-20 (S.D.

N.Y. 1984). As in the context of an award of attorney's fees in a Title VII case,

> Vindication of the policy of the law depends to a significant degree on the willingness of highly skilled attorneys . . . to accept employment . . . on a wholly contingent basis. They will hardly be willing to do so if their potential compensation is limited to the hourly rate to which they would be entitled in non-contingent employment. Busy and successful attorneys simply could not afford to accept contingent employment if those were the rules that were applied. The enforcement of our civil rights acts would then be entrusted largely to less capable and less successful lawyers who lack sufficient employment. Such an arrangement would ill serve policies of enormous national importance.

Yates v. Mobile County Personnel Board, 719 F.2d 1530, 1534 (11th Cir. 1983). Therefore, the Court considers that an overall contingency multiplier of 15% is appropriate.

In regard to Mr. Greene, the additional factor of the undesirability of the case (factor 10) must be taken into account. As indicated above, the racial overtones of the cases at bar very definitely and very negatively affected his legal practice. The cases precluded other employment for all the lawyers by occupying their time, but Mr. Greene's practice was handicapped by his association with a cause linked to minorities.[34] The Court cannot project what Mr. Greene would have earned from

---

34. The Court considers that this is the sort of undesirability for which *Johnson* compensates. *Cf. Guajardo v. Estelle,* 432 F.Supp. 1373, 1388 (S.D. Tex. 1977), *modified on other grounds,* 580 F.2d 748 (5th Cir. 1978) (case labeled "undesirable" because lawyers devoted themselves to the case without expectation of payment).

employment lost to him because of the cases. The type and amount of work lost is indeterminate. Yet, not to compensate for the detriment of lost work and insult would be grossly unfair. Accordingly, the Court will award an additional multiplier of 5% to Mr. Greene's fees. Multipliers have been given to compensate for a case's undesirability. *See e.g., Hart v. Bourque,* 608 F. Supp. 1091, 1094 (D. Mass. 1985). *c.f. Ramos v. Lamm,* 713 F.2d 546, 557-58 (10th Cir. 1983) ("a bonus for the social stigma assumed by a lawyer participating in civil rights litigation should rarely be given."). The loss could have been small, *e.g.,* if the potential clients Mr. Greene lost had small matters or matters that would have been impossible to undertake anyway because of the demands of the instant cases. On the other hand, the matters could have been large ones with quick renumeration to be had in settlements with percentages allotted to attorney's fees.

Conclusion

For the foregoing reasons, the Motions for Attorneys' Fees by Al Greene, George Korbel, Jesse Botello, Craig Washington, and Frumencio Reyes are GRANTED.

TABLE A

FEES

Lawyer	*No. Of Hours*	*Rate Per Hour*	*Total (includ. 15% Multiplier)*
George Korbel	1391	$200	$319,930.00
Al Greene	1485.1	$200	$356,424.00
			(5% additional multiplier)
Jesse Botello	1230	$150	$212,175.00
Frumencio Reyes	141	$100	$ 16,215.00
Aldape	15	$100	$ 1,725.00
Craig Washington	217.9	$200	$ 50,117.00
Bracquet	39.1	$ 85 for 3.9 hours and $100 for 35.2	$ 4,048.00
Bodie	47.7	$ 60	$ 3,291.30
Temple	6.1	$ 60	$ 915.00
Evans	.8	$135	$ 124.20
Hogan & Hartson	86.25	$200	$ 19,837.50
			$984,801.50

TABLE B

EXPENSES

Lawyer	*Amount*
George Korbel	$ 2,829.18
Al Greene	$ 32,268.64[1]
Jesse Botello	$ 5,222.64
Craig Washington	$ 110.46
TOTAL EXPENSES	$ 40,430.92
TOTAL FEES AND EXPENSES TO PLAINTIFFS' LAWYERS	$1,025,232.40

1. Includes $12,000 in fees to expert witness Dr. Chandler Davidson and $12,000 for Dr. Richard Murray.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-78-2174
(consolidated with following cases)

MOSES LEROY, ET AL.,
Plaintiffs,

v.

CITY OF HOUSTON, ET AL.,
Defendants.

C.A. NO. H-73-1650

GREATER HOUSTON CIVIL COUNCIL, INC.,
Plaintiff,

v.

FRANK MANN,
Defendant.

C.A. NO. H-75-1731

MOSES LEROY,
Plaintiff,

v.

CITY OF HOUSTON,
Defendant.

FINAL JUDGMENT

For the reasons set forth in the Court's Memorandum Opinion and Order of the same date, Plaintiffs' Motions for Attorneys' Fees and Expenses are hereby GRANTED as set forth in the attached Tables A and B.

THIS IS A FINAL JUDGMENT.

The Clerk shal file this Order and provide a true copy to counsel for all parties.

DONE at Houston, Texas, this 1st day of August, 1986.

/s/ GABRIELLE K. McDONALD
Gabrielle K. McDonald
United States District Judge

TABLE A

FEES

Lawyer	*No. Of Hours*	*Rate Per Hour*	*Total (includ. 15% Multiplier)*
George Korbel	1391	$200	$319,930.00
Al Greene	1485.1	$200	$356,424.00
			(5% additional multiplier)
Jesse Botello	1230	$150	$212,175.00
Frumencio Reyes	141	$100	$ 16,215.00
Aldape	15	$100	$ 1,725.00
Craig Washington	217.9	$200	$ 50,117.00
Bracquet	39.1	$ 85 for 3.9 hours and $100 for 35.2	$ 4,048.00
Bodie	47.7	$ 60	$ 3,291.30
Temple	6.1	$ 60	$ 915.00
Evans	.8	$135	$ 124.20
Hogan & Hartson	86.25	$200	$ 19,837.50
			$984,801.50

TABLE B

EXPENSES

Lawyer	*Amount*
George Korbel	$ 2,829.18
Al Greene	$ 32,268.64[1]
Jesse Botello	$ 5,222.64
Craig Washington	$ 110.46
TOTAL EXPENSES	$ 40,430.92
TOTAL FEES AND EXPENSES TO PLAINTIFFS' LAWYERS	$1,025,232.40

1. Includes $12,000 in fees to expert witness Dr. Chandler Davidson and $12,000 for Dr. Richard Murray.

APPENDIX C

Moses LEROY, et al.,
Plaintiffs-Appellees,

v.

CITY OF HOUSTON, et al.,
Defendants-Appellants.

No. 86-2719.

United States Court of Appeals,
Fifth Circuit.

Nov. 12, 1987.

Rehearing and Rehearing En Banc
Denied Dec. 28, 1987.

Black and Hispanic voters who brought actions under Voting Rights Act against city challenging at-large method of electing city council and annexation of new areas filed motions for award of attorney fees and expenses. The United States District Court for the Southern District of Texas, 648 F.Supp. 537, Gabrielle K. McDonald, J., found that voters were prevailing plaintiffs entitled to award of attorney fees, and city appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) voters whose actions were significant catalyst in city's adoption of single-member districts were entitled to award of attorney fees incurred in litigation, even if city's decision was in part based on federal government's refusal to preclear annexations; (2) plaintiffs were not entitled to award of attorney fees incurred by attorneys' lobbying activity before Department of Justice; and

(3) multiplication of lodestar fee by contingency factor was improper absent evidence that litigation was exceptional or that plaintiffs would have been unable to find counsel in local market absent risk-enhancement.

Reversed and remanded.

John E. Fisher, Robert J. Collins, Houston, Tex., for City of Houston, et al.

Jessica Dunsay Silver, George Schneider, Attys., U.S. Dept. of Justice, Civ. Rights Div., Wm. Bradford Reynolds, Washington, D.C., for amicus curiae, U.S.

George Korbel, L.A. Greene, Jr., Craig A. Washington, Houston, Tex., Sidney J. Braquet, Jessie Bottello, San Antonio, Tex., for Moses Leroy, et al.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG and JONES*, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The district court awarded attorneys' fees and costs exceeding $1,000,000 to plaintiffs, who it found "prevailed" in three separate actions and administrative proceedings to enforce the Voting Rights Act, 42 U.S.C. § 1973*l et seq.* against the City of Houston. We disagree with significant portions of the district court's legal analysis, and consequently we REVERSE and REMAND.

---

* Due to his death on October 19, 1987, Judge Hill did not complete his participation in this decision. The case is therefore decided by a quorum. 28 U.S.C. § 46(d).

I.

The skirmish over attorneys' fees culminates a complex, protracted and in many ways unique battle between the protagonists in this litigation. In December, 1973, the plaintiff-appellants, black and hispanic voters in Houston, Texas, filed suit alleging that their votes were unconstitutionally diluted by the at-large method of electing the Houston City Council. *Greater Houston Civic Council v. Mann,* No. H-73-1650 (S.D. Tex.) (*Mann*).

Two years later, before *Mann* had come to trial, the same attorneys, representing the same and similar plaintiffs, filed a second lawsuit. In that action, they sought to enjoin a city election in which voters from several newly annexed areas would be participating, because the annexations had not been submitted for preclearance through the Department of Justice under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[1] *Leroy v. City of Houston,* No. H-75-1731 (S.D. Tex., Oct. 1975) (*Leroy I*). By the time the complaint in *Leroy I* was served on the City, it had submitted the annexations to the U.S. Attorney General for review under section 5. A three-judge court denied the requested preliminary injunction, the annexations were subsequently precleared by the Attorney General, and *Leroy I* was dismissed in 1978. Attorneys' fees requested by the plaintiffs were denied by the three-judge court. *Leroy I* was dismissed with prejudice, costs being taxed against the Plaintiffs, and no appeal followed.

---

1. Plaintiffs asserted that the annexations affected changes in local voting procedures. Such changes must be submitted to and reviewed by the Justice Department to assure that they do not dilute minority voting rights. The plaintiffs believed that annexation of predominantly white neighborhoods would be adverse to their interests.

In 1976, *Mann* went to trial for five and one-half weeks. The following year the district court entered judgment for the defendants, holding that the at-large system did not dilute minority voting strength in Houston. Plaintiffs appealed, and in August, 1978, the Attorney General appeared as amicus curiae on plaintiffs' behalf, urging this Court to vacate the district court's decision.

The City continued to expand through annexations in 1977, but by November 1978, it had not submitted these additional accretions of territory for Justice Department review under section 5. A special bond election was set in the expanded city for January 1979. The plaintiffs, having been denied leave to amend their complaint in *Leroy I*, filed a new complaint seeking to enjoin the annexations and further elections pending preclearance. *Leroy v. City of Houston*, No. H-78-2174 (S.D. Tex., Nov. 1978) (*"Leroy II"*). The Attorney General sued the City for the same purpose, and the two cases were consolidated on December 15, 1978. The City assured the three-judge court that the annexations would be submitted and no elections would be held until preclearance was obtained. Accordingly, on December 28, 1978, the court denied motions filed by the Attorney General and the private plaintiffs for a preliminary injunction.

The City submitted both its 1977 and 1978 annexations for section 5 review by the Justice Department. The Department of Justice communicated with the individual plaintiffs and their attorneys who urged the Attorney General to object to the annexations in question. In June, 1979, the Attorney General did object to 14 of the annexations which he found diluted minority voting

strength in the context of the city's at-large voting system. Nevertheless, the Attorney General pre-cleared the holding of a referendum in the expanded city for the purpose of adopting a mixed single-member and at-large voting plan.[2] The voters approved the referendum, and in September, 1979, the Attorney General precleared the districting based on the new plan and withdrew his objection to the annexations.

The parties in *Mann* thereupon informed this Court that the appeal was moot. In December 1979, this Court remanded to the district court for consideration of attorneys' fees. The issue of attorneys' fees languished in the district court until late 1982. Following extensive proceedings, including an aborted attempt by the City to recuse the district judge and an eight-day trial, the district court awarded fees, as requested by the plaintiffs, for their pursuit of litigation in *Mann*, *Leroy I*, *Leroy II*, and the Attorney General's administrative Section 5 review process.

The City of Houston appeals both the legal basis and amount of the award, and the Justice Department appears as amicus curiae on the former issues.

II.

[1] The "prevailing party" in a Voting Rights Act lawsuit is entitled to recover his attorney's fees. 42 U.S.C. § 1973*l*(e).[3] If the plaintiff prevails because judgment is

2. The proposed revision included nine members elected from single-member districts and five elected at-large.

3. "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

rendered in his favor, a successful claim for fees is a foregone conclusion. Questions arise, however, when essential victory is obtained by other means than judgment following trial. Nevertheless, "all of the circuit courts have consistently held . . . that a plaintiff may also prevail for § 1988[4] purposes when the case terminates in his favor by settlement, or when the defendant voluntarily undertakes action that results in accomplishment of the plaintiff's goal even though it moots the case." *Hennigan v. Ouachita Parish School Board*, 749 F.2d 1148, 1151 (5th Cir. 1985). In such a case, the plaintiff must identify the goal that he sought to achieve in bringing his action. When that goal has been achieved by the defendant's conduct apart from the compulsion of court order, the plaintiff must then establish that the lawsuit caused the defendant to act. *Hennigan* is instructive:

> To demonstrate this causal connection, the plaintiff must demonstrate that his suit was 'a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior.' (citations omitted). This means more, however, than merely showing that the event occurred after suit was filed. Here, as elsewhere in the law, *propter hoc* must be distinguished from *post hoc*. The inquiry has been described as 'an intensely factual, pragmatic one,' (citations omitted) and courts should carefully consider the chronology of events in order to assess the provocative effect of the plaintiffs' lawsuit. (citations omitted).

Hennigan, 749 F.2d at 1152. *See also Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984), *cert. denied*, 471

---

4. 42 U.S.C. § 1988, governing fees in civil rights cases, is phrased similarly and should be construed consistently with the Voting Rights Act fee provision. *Arriola v. Harville*, 781 F.2d 506, 511 (5th Cir. 1986).

U.S. 1065, 105 S. Ct. 2139, 85 L.Ed.2d 497, 53 U.S. L.W. 3776 (1985); *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982); *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981).

That plaintiffs eventually obtained the objective of their litigation is not seriously disputed. *Mann* sought to revise the election of city council members from an at-large system to that of single member districts. In 1979, the City instituted the mixed plan previously described. The City also agreed that in the course of future annexation activity, any necessary expansion of city counsel would continue to protect minority representation.[5] The substantial questions for prevailing party purposes are (1) whether palintiffs' litigation was a significant catalyst to the defendants to revise city council districts, and (2) if so, the extent to which all three of plaintiffs' lawsuits plus the participation in Justice Department administrative proceedings are compensable.

A. *Catalytic Effect*

[2] The district court found as a fact that the plaintiffs' litigation was a significant catalyst to the city's adoption of single-member districts. This finding is not clearly erroneous. Fed. R. Civ. P. 52(a). "[T]he court of appeals may not reverse, . . . even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

---

5. The City's suggestion that the mixed plan for city council governance did not achieve the plaintiffs' goals for litigation is niggling.

The City objects that the change to single member districts was motivated principally by the increasingly unfavorable reaction of the Department of Justice to its vigorous annexation policy. In particular, the City contends that the Justice Department, while agreeing to preclear annexations of majority-white areas in 1977, foreshadowed future resistance to that policy if it were unaccompanied by protection for minority rights by measures like single member districts. The City urges that the imperatives of expanding the municipal tax base via annexation, combined with the Justice Department reaction, more powerfully motivated the City than did the litigation. This charge must fail. First, it quarrels only with the district court's assessment of the facts, which we cannot lightly disturb. Second, it misperceives as the plaintiffs' burden the duty to prove that the litigation was the only causative factor in the defendants' conduct. This is not so. The "substantial factor" or "significant catalyst" test does not require such exclusivity. Other events may have contributed to the City's ultimate acquiescence in the mixed district plan, but the district court would still be justified in concluding, from the facts before it, that the plaintiffs' litigation was also a significant contributing factor.[6] In a way, the City's argument against causal connection boils down to the charge that plaintiffs jumped on the redistricting train too early, with *Mann*, and thereafter were submerged in the course of events. Compare *Posada v. Lamb County*, 716 F.2d 1066, 1071 (5th Cir. 1983), where the district court found that the plaintiffs boarded the train as it left the station and therefore

6. The City points out various alleged errors in the district court's statement of facts. We find that none of them, taken singly or together, bears so directly on the court's ultimate conclusion as to undermine its overall trustworthiness.

denied fees. The chronology of events is indeed significant, but we cannot find clear error in the district court's contrary portrayal of causation.

[3] The City, reinforced by the Department of Justice as amicus, also objects to the district court's lengthy description of the litigation as a cause acting upon the Justice Department to force the city to redistrict. We agree that this focus is unwarranted. The court described and analyzed the Justice Department's conduct in June 1979, when it refused to preclear the 1977-78 annexations, without any evidence from the Department itself. The court found that plaintiffs' lobbying activities before the Department galvanized the Department's opposition to Houston's continued reliance on single-member districts. The court's conclusions are founded on hearsay testimony and speculation regarding Justice Department resources, policies and procedure in this case. The Justice Department rightly complains that it is inconsistent with the spirit and purpose of administrative preclearance under section 5 of the Voting Rights Act to permit judicial inquiry into its functions. Administrative pre-clearance activities are excluded from direct judicial review because speedy, definitive oversight of local election .procedures, required by the statute, could not be achieved by allowing judicial review. *Morris v. Gressette*, 432 U.S. 491, 505, 97 S. Ct. 2411, 2420, 53 L.Ed.2d 506 (1977). Moreover, the Department relies heavily on confidential information and internal memoranda at arriving at administrative pre-clearance decisions. As the Justice Department suggests, the district court's mode of analysis here could easily have led or could in the future influence the parties to seek documents or testimony from the Department in order to prove whether plaintiffs' litigation

motivated the Department to a course it would not otherwise have taken. Compare *Posada v. Lamb County,* 716 F.2d at 1075, superseded in this respect by *Arriola v. Harville,* 781 F.2d at 510. Such inquiries cannot be furthered consistent with upholding the confidentiality and efficiency of the administrative process.

This error by the district court does not, however, undermine its general finding, based upon the entire sequence of events, of a significant causal connection between plaintiffs' litigation and municipal redistricting. *Leroy II,* according to the district court, resulted in the City's promise to preclear its 1977-78 annexations with the Justice Department. *Mann,* although lost at trial by the plaintiffs, was widely expected to be reversed and remanded and would pose a continuing threat of judicial intervention in the City's districting. Plaintiffs had demonstrated the perseverance to litigate whenever this would focus public attention on the alleged deficiencies of at-large voting, and the City could anticipate further similar activity.

Approaching from another perspective the compensability of the plaintiffs' lobbying activities with the Department of Justice, the City questions whether *Leroy II,* brought solely to enforce Section 5 pre-clearance procedures, can be reimbursed when the plaintiffs' avowed goal is substantive revision of election laws.[7]

The City and the Justice Department protest such an award as incongruous because Section 5 litigation has the narrow objective of forcing the governing body to

7. The district court did not discuss whether plaintiffs could be prevailing parties in *Leroy II* simply because that case resulted in the City's submission of annexations to the Department of Justice. It is unnecessary for us to reach this possible contention.

submit a proposed voting change to the Justice Department without considering the merits of the proposal. *Perkins v. Matthews,* 400 U.S. 379, 383-86, 91 S. Ct. 431, 434-35, 27 L.Ed.2d 476 (1971). They would urge us to reject as a matter of law any causal connection between a plaintiff's Section 5 action and subsequent redistricting. We find no incongruity. The rather unusual situation in this case arises because plaintiffs had already litigated the constitutionality of the City's districting in *Mann* at the time that additional annexations compelled them to file *Leroy II.* The issue of substantive district revision was pending in the courts, pretermitting further assertions of such a cause of action. *Leroy II,* however, sought and achieved the goal of requiring the City to submit major annexations for Justice Department approval. In this case, achieving the procedural goal of preclearance review was expected by the plaintiffs to yield a favorable result before the Justice Department. If the City's annexations were found by the Department of Justice not to protect minority voting rights, then the status of the annexations, and any bond elections predicated thereon, would remain doubtful pending compliance with the Voting Rights Act. We have elsewhere noted that in awarding fees for a school board reapportionment lawsuit, "the district court properly ignored the route taken, . . . and focused instead on the fact that the plaintiffs arrived at their sought-after destination." *Hennigan,* 749 F.2d at 1153. Here, too, we find a compelling causal relation between the *Leroy II* procedural action to force Justice Department review of the voting change caused by annexations and the substantive revision sought by the plaintiffs.

The plaintiffs were, in sum, the irresistible force pressing upon the City as immovable object.

B. *Compensable "Litigation" Activity*

The remaining issue with respect to plaintiffs' prevailing party status centers around whether their three lawsuits and activities before the Justice Department are fully compensable as "part and parcel of the litigation to enforce the Voting Rights Act." The district court breezed to this conclusion in the face of formidable procedural and legal obstacles.[8] The City acknowledges that if *Mann* significantly contributed to a redistricting decision, that litigation is compensable. *Leroy II* likewise falls within § 1973*l*(e). The district court's conclusions regarding *Leroy I* and the Department of Justice lobbying activities, for separate reasons, are infirm.

[4] On a procedural basis, the district court erred in concluding that the time expended on *Leroy I* was compensable. The issue of attorneys' fees had previously been resolved against the plaintiffs in that case by a three-judge panel whose ruling was not appealed. *Leroy I* was dismissed with prejudice, no injunction against preclearance was entered, and costs were taxed against the plaintiffs. We espy no warrant in the Voting Rights Act to award attorneys fees for litigation already concluded in which recovery of fees was refused. The "part and parcel" determination by the district court overlooked the prior, controlling decision in *Leroy I* against an award of fees. The parties were bound by this result, *Southern Pacific Railroad Co. v. U.S.*, 168 U.S. 1, 48-9, 18 S. Ct. 18, 27, 42 L.Ed. 355 (1897), and the district court could not reverse it.

---

8. According to plaintiffs' fee application, they spent approximately 2,450 hours in connection with *Mann;* 140 hours on *Leroy I;* 496 hours on *Leroy II;* and 114 hours before the Department of Justice.

[5] Second, in holding compensable the plaintiffs' activities before the Department of Justice, the district court recognized, but purported to distinguish, *Webb v. Board of Education in Dyer County*, 471 U.S. 234, 105 S. Ct. 1923, 85 L.Ed.2d 233 (1985) and *Arriola*, 781 F.2d 506. We find that these cases expressly prohibit an award of legal fees for plaintiffs' attorneys' lobbying activity before the Justice Department and consequently reverse this portion of the award. In *Webb*, the Supreme Court determined that attorneys' fees could not be awarded under 42 U.S.C. § 1988, the counterpart of the instant fee-shifting statute, for a state administrative process completed before litigation under the Civil Rights Act. The court said,

> Congress only authorized the district courts to allow the prevailing party a reasonable attorneys fee in an "action or proceeding to enforce [§ 1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983. . . . The time that is compensable under § 1988 is that "reasonably expended *on the litigation*." (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 [76 L.Ed.2d 40] (1983).

Webb, 471 U.S. at 241-42, 105 S. Ct. 1928. The district court correctly observes that *Webb* did not appear to prohibit the recovery of attorney's fees for administrative proceedings for "work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." *Webb*, 471 U.S. at 243, 105 S. Ct. at 1929. However, the Supreme Court also noted, in the course of distinguishing between work performed "on the litigation" and work that ad-

vanced the administrative process alone, that the five years of work by plaintiff's counsel in the administrative proceeding was easily separated from the two years of work invested in subsequent litigation. We interpret *Webb* to require that counsel's participation in administrative activities be tied both qualitatively and timely to the lawsuit in order to establish that such work was performed "on the litigation". Contrary to the district court's conclusion, *Webb's* standard was not met in this case.

First, from the standpoint of timeliness, the work counsel performed in the litigation and administrative proceedings here is as easily separable as in *Webb*. The plaintiffs' alleged constitutional entitlement to single-member districts had been tried in *Mann* in 1976, with judgment entered in 1977. *Leroy II* concluded in December, 1978. Only in 1979 did plaintiffs' counsel lobby before the Justice Department to promote the need for single-member districts. *Webb's* standard of timeliness was previously applied by our court to the preclearance procedure under the Voting Rights Act in *Arriola,* 781 F.2d at 511, and is controlling in this case. *Arriola* held that time spent by plaintiffs' counsel, after injunction litigation had been completed successfully under the Voting Rights Act, for the purpose of influencing the Justice Department's pre-clearance review is not part of the litigation for purposes of attorneys' fee awards.[9]

With regard to the qualitative relation between work in administrative proceedings and work performed on the litigation, *Webb* likewise precludes plaintiffs' recovery

9. *Arriola* rejected the contention that *Webb* could be distinguished based on whether plaintiff's counsel appeared in administrative proceedings before or after the lawsuit. That rejection governs our panel.

of fees. Although the district court quoted *Webb's* operative language, it failed to state how the Justice Department efforts were "both useful and of a type ordinarily necessary to advance the civil rights litigation." *Webb*, 471 U.S. at 243, 105 S. Ct. at 1929. *Webb's* facts narrowly limit the scope of administrative work for which legal fees are recoverable. There, the plaintiff's counsel participated in trial-type proceedings involving precisely the issues and evidence later pertinent to plaintiff's § 1983 lawsuit. The Court nevertheless rejected any per se rule permitting recovery. As *Arriola* noted, pertinent to this case, the nature of the trial and administrative preclearance proceedings under the Voting Rights Act is essentially different.[10] Moreover, the district court's bare finding that "the work done before the Justice Department was a direct catalyst of change necessary to the resolution of the lawsuits," is insufficient to satisfy *Webb* and *Arriola*. Formulating the qualitative relationship in terms of causal connection confuses two distinct issues. Causal connection between counsel's efforts in litigation and the goal achieved by plaintiffs is essential to prevailing party status, as previously discussed. Whether the counsel's efforts were expended "on the litigation", however, as § 1973*l*(e), *Hensley*, *Webb*, and *Arriola* necessitate, identifies what services are compensable once plaintiff has shown that he prevailed. The "catalytic effect" perceived by the district court does not demonstrate that the services rendered before the Justice Department bore directly on the issues in *Mann* or were legally required or necessary to resolve *Mann*, which was then fully briefed on appeal.

10. "[T]he preclearance process is separate from the lawsuit. The participants are not the same. The preclearance process is in a different forum. It follows different law. In fact . . . it is not a judicial proceeding at all." *Arriola*, 781 F.2d at 511.

Similarly, *Leroy II* had concluded before preclearance review occurred. Thus, although we endorse *Arriola's* observation that prevailing party counsel might in some cases recover "compensation for services rendered in a preclearance submission that bear directly on the issues in an independent lawsuit and where the work is required and necessary to resolve the issues of the independent lawsuit," *Arriola,* 781 F.2d at 507, n. 1, we perceive no basis to distinguish the denial of fee recovery in *Arriola* from this case.

To summarize the preceding discussion, plaintiffs are entitled to attorneys fees for their efforts in the *Mann* and *Leroy II* litigation. We reverse the district court's award of fees for *Leroy I* and counsel's efforts in the Justice Department preclearance proceeding.

III.

After considering the factors enumerated in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974), the district court awarded approximately $850,000 in attorneys' fees for 4,659.95 hours of recorded services. After applying a contingency multiplier of 1.15 (1.20 for Green) and approximately $40,000 in expenses, the total award exceeds $1,000,000. The City challenges the total as excessive.[11]

---

11. Having found certain aspects of the legal services non-compensable as a matter of law, we apply the following discussion to the remaining services covered by the award. We also note that the *Johnson* factors must now be considered in the following framework: (1) ascertain the nature and extent of the services supplied by the attorney; (2) value the services according to the customary fee and quality of the legal work; and (3) adjust the compensation on the basis of the other *Johnson* factors that may be of significance in the particular case. *Curtis v. Bill Hanna Ford, Inc.,* 822 F.2d 549, 552 (5th Cir. 1987), citing *Nisby v. Comm'n Court of Jefferson County,* 798 F.2d 134, 136 (5th Cir. 1986), clarified by *Cobb v. Miller,* 818 F.2d 1227 (5th Cir. 1987).

Two recent Supreme Court decisions support challenges made by the City. In *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, ____U.S.____, 107 S. Ct. 3078, 97 L.Ed.2d 585 (1987), a four-man plurality held that "in the absence of further legislative guidance, we conclude that multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes." *Delaware Valley*, ____ U.S. at ____, 107 S. Ct. at 3087. Justice O'Connor separately concurred with an additional portion of the opinion, resulting in a majority view, that even if the Clean Air Act's fee shifting provision, and by analogy that of § 1988 and similar statutes, should permit such an adjustment for risk, it should be awarded under strictly controlled circumstances. *Delaware Valley*, ____ U.S. at ____, 107 S. Ct. at 3089.[12]

[6] For several reasons, the contingency factor awarded by the district court in this case does not pass muster under this newest episode of the *Delaware Valley* litigation. First, the court majority's fear of "severe difficulties and possible inequities" involved in making contingency awards requires that they be reserved for "exceptional cases." *Delaware Valley*, ____ U.S. at ____, 107 S. Ct. at 3088, concurring opinion, 107 S. Ct. at 3090. Second, the need and justification for a contingency award must be readily apparent and supported by evidence in the record and specific findings by the court. *Delaware Valley*, ____ U.S. at ____, 107 S. Ct. at 3088. Contrary to *Delaware Valley*, the district court did not find that this

12. The plurality admonished, "an attorneys fee award should be only as large as necessary to attract competent counsel." *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986), cited in *Delaware Valley*, ____ U.S. at ____, 107 S. Ct. 3089, n. 12.

litigation, although filed in a complex area of law, was "exceptional." We do not perceive it as such. There is also none of the required evidence that without risk-enhancement the plaintiffs in this case would have been unable to find counsel in the local market. Although the court observed at one point that two public interest firms were uninterested in this litigation, the final fee award runs to a consortium of ten individual attorneys plus Hogan & Hartson, indicating a breadth of available talent. Moreover, the trial court erroneously justified the contingency factor in part upon findings that the Supreme Court majority says are not pertinent to evaluation of this issue, e.g., that plaintiff's position is unpopular in the community, and that the defendant was difficult and obstreperous. *Delaware Valley,* 107 S. Ct. at 3089. Finally, the district court relied upon the holding of the Eighth Circuit in *Craik v. Minnesota State University Board,* 738 F.2d 348, 350-51 (8th Cir. 1984) that contingency adjustments must be made to attract lawyers to civil rights cases, a holding expressly rejected by the Supreme Court majority in *Delaware Valley,* 107 S. Ct. 3082, n. 4; Justice O'Connor's concurrence, 107 S. Ct. at 3090. In sum, the district court's award of a contingency adjustment to the lodestar, particularly in view of its generous treatment of the lodestar issues themselves, cannot survive the constraints imposed by *Delaware Valley.*

[7] The second recent controlling development is the Court's determination that expert witness fees in excess of standard per diem and mileage costs may not be allowed as part of the costs to prevailing parties under federal fee-shifting statutes unless the statute explicitly so provides. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,*

____U.S.____, 107 S. Ct. 2494, 96 L.Ed.2d 385 (1987). Although that case expressly considered whether Fed. R. Civ. Proc. 54(d) could, in an antitrust case, override the statutory limit on witness fees, the Court's general reasoning leaves us no room to construe the Voting Rights Act provision here otherwise. *But see* Blackmun, J., concurring, ____U.S.____, 107 S. Ct. 2499. The Voting Rights Act does not specifically allow recovery of expert witness fees, and we must reverse this portion of the district court's award.[13]

[8] The district court's findings of fact supporting its award are reviewed under the clearly erroneous standard, but the ultimate award of attorneys' fees is reviewed for abuse of discretion. *Cobb v. Miller,* 818 F.2d 1227, 1231 (5th Cir. 1987); *Brantley v. Surles,* 804 F.2d 321, 327 (5th Cir. 1986). As noted in *Schwarz v. Folloder,* 767 F.2d 125 (5th Cir. 1985), however, "[d]iscretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Schwarz,* 767 F.2d at 127 (citations omitted). After extensively reviewing the record, we are disturbed that the district court uncritically skewed the lodestar factors in every instance favorably to the plaintiffs and against the City.

[9] In setting the hourly rate applicable to each of the plaintiffs' attorneys, the district court used rates prevailing in 1985, even though virtually all of the work was performed in the period 1976-79. While current rates may be used to compensate for inflation and delays in

13. Plaintiffs contend that the compensability of expert witness fees was not raised previously by the City. We read the City's brief, together with its reference to the trial court opinion, squarely to present this issue.

payment, *see Delaware Valley*, 107 S. Ct. 3081, *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1096 n. 26 (5th Cir. 1982), the district court based its figures on current rates *and current levels of expertise*. Thus, the plaintiffs' attorneys received a double boon: they received compensation based on current rates for work done, for the most part, in the late 1970's, and they were permitted to base their current rates on experience and expertise gained since that time.[14] From our review of the record in this case, we are convinced that this practice produced a windfall of the sort disdained by Congress and the Supreme Court. *See City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 2697, 91 L.Ed.2d 466 (1986); *Hensley*, 461 U.S. at 431 n. 4, 103 S. Ct. at 1938 n. 4.

The district court awarded fees at the high end of the spectrum of current local commercial practice rather than at rates customarily charged by attorneys in civil rights cases or customarily charged by these counsel in private practice. The City does not contend, and we therefore do not decide, whether the prevailing rate must be gauged by reference to the actual rates charged by plaintiff's

---

14. For example, the district court justified its rate of $200 per hour for L.A. Greene based in part on his board certificated status and on the fact that he has lectured, taught, and published. However, Mr. Greene's resume [PX 14a] indicates that he was not board certified in Civil Trial Law until two years after the *Mann* trial, while the bulk of his submitted hours were spent, and all of his lectures, publications, and teaching positions date after 1980.

Even more troubling is the $150 per hour rate awarded Jesse Botello. The majority of Botello's hours were spent on the trial of the *Mann* case in 1977-78. As Mr. Botello was licensed to practice in 1976, the effect of the district court's decision was to award $150 per hour for work done by a second- or third-year attorney. While we recognize Mr. Botello's particular expertise in Voting Rights Act law, such an hourly rate is unreasonable.

counsel, if they can be calculated, instead of by market data. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 13-18 (D.C. Cir. 1984). Insofar as the City suggests that the hourly rates awarded are clearly erroneous under the standard used by the district court, we cannot so find. Nevertheless, the court took a generous view of the appropriate hourly rates and does not seem to have considered as particularly probative these lawyers' actual charges for comparable services. For instance, Mr. Korbel billed only $125/hour to the City of San Antonio in 1978, but the court awarded his fee at $200/hour.

[10] Miscellaneous determinations by the district court further color our review of its exercise of discretion. The court focused on such inappropriate matters as the lack of funds available to plaintiffs' counsel and that a black person oversaw some appellate briefing for the City to undergird its determination of fees. Moreover, in the context of discussing the difficulty prong of *Johnson*, the court castigated the City and its attorneys for various misdeeds committed during the litigation, such as the method of the City's submission of plans to the Justice Department, the City's request that certain meetings with the Justice Department be closed, the City's attempt to have the district judge recused from the case, and the City's alleged reneging on a settlement on attorneys' fees. We disagree with the district court's finding that "the plaintiffs' attorneys are entitled to be paid for being subjected to this conduct." An award of attorneys' fees is to be used as an incentive for the private enforcement of constitutional rights, and not as a shill for the imposition of punitive damages. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3rd Cir. 1983). The determination of hours spent by counsel adequately reflects the work they

did in responding to the City's strategy. Compare *Delaware Valley*, ____U.S.____, 107 S. Ct. at 3089. No punitive compensation was required.

[11] We are also troubled by the court's wholesale acceptance of plaintiffs' time records. In assessing time spent by plaintiffs' counsel for lodestar purposes, the court repeatedly acknowledged deficiencies in the billing records in this case, noting that some were reconstructed, after-the-fact summaries, some were often "scanty," some were never kept at all, and many lacked explanatory detail. Nevertheless, the district court accepted *in toto* the number of hours evidenced by the records on such grounds as Mr. Botello's law school training in record-keeping, the purported exercise of billing judgment,[15] and that this court has required contemporaneous records only since 1983. *But see Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1094 (5th Cir. 1982). None of these asserted grounds explain why such faulty records should be accepted with no reduction of the hours of the lodestar. Indeed, *Hensley* counsels the opposite. *See Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly"). Perhaps the best examples of the district court's rationale for its decision were its findings that "the City has [not] demon-

15. Despite making repeated findings that the attorneys exercised billing judgment in this case, the billing records are completely devoid of any hours written off. *See National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327-28 (D.C. Cir. 1982) (billing records should reflect whatever time was spent on the case but not included in the fee request). In fact, the sole example of billing judgment shown on the face of the record involved Mr. Korbel, who originally eliminated 196 hours from his request as an exercise in billing judgment, only to reinstate that time request later.

strated that . . . the hours were unreasonable" and that it "heard no serious, specific objection to the reasonableness" of the hours claimed. Such logic is misplaced: the burden of proof of reasonableness of the number of hours is on the fee applicant, *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941, and not on the opposing party to prove their unreasonableness.

After careful review of the record, this court holds that to award $1 million in attorneys' fees and expenses was excessive and an abuse of discretion. While it is a rare case indeed in which we find an abuse of discretion regarding an award of attorneys' fees, we cannot shirk our responsibility under the law when we encounter one. *See Cobb v. Miller*, 818 F.2d at 1227 (reversing and rendering on the amount of attorneys' fees). We have laboriously reviewed the record in light of the district court's opinion, the parties' contentions, and the considerations outlined in this opinion. We believe a fair, indeed ample award of $693,805[16] remunerates the ultimately successful efforts of plaintiffs' counsel and fulfills the goal of the Voting Rights Act. The excess amount awarded by the district court was founded on erroneous legal analysis and in part upon an abuse of its discretion. We therefore vacate the judgment of the district court, and remand for entry of a judgment in the amount of $693,805.00.

---

16. We reach this result as follows. The district court awarded appellees approximately $843,337.50 for 4,659.95 hours' work, before adding any contingency multiplier. This represents an average hourly rate of $181. We deduct 254 hours from the base number of hours, reflecting the work on *Leroy I* and the Justice Department proceedings that we have held non-compensable. We further deduct 13% from the average hourly rate for incomplete time records. The resulting award is $693,805.00.

The judgment of the district court is REVERSED and the case is REMANDED for entry of judgment consistent herewith.

REVERSED and REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2719

MOSES LEROY, ET AL.,
Plaintiffs-Appellees,

versus

CITY OF HOUSTON, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion November 12, 5 Cir., 1987, ____F.2d____)

(DECEMBER 28, 1987)

Before GOLDBERG and JONES*, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor judge in regular active service of this Court

---

* Due to his death on October 19, 1987, Judge Hill did not complete his participation in this decision. The case is therefore decided by a quorum. 28 U.S.C. 46(d).

having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/ EDITH H. JONES 12/22/87
United States Circuit Judge

(2)

No.87-1611

In The

Supreme Court of the United States

October Term, 1987

THE CITY OF HOUSTON, ET AL.,

Petitioners,

v.

MOSES LEROY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

George J. Korbel
220 Gardenview
San Antonio, Texas 78213

Jesse Roy Botello
515 South Main
San Antonio, Texas 78204
(512) 225-5346

L.A. "Al" Greene Jr.
535 Marathon Oil Tower
5555 San Felipe
Houston, Texas 77056
(713) 529-7700

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

39pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the U.S. Court of Appeals for the Fifth Circuit properly apply the clearly erroneous standard in the review of the findings of fact by the district court that the Plaintiffs' litigation was a significant catalyst which caused the City to abandon at-large elections.

2. Did the U.S. Court of Appeals for the Fifth Circuit properly apply the clearly erroneous standard in the review of the award of fees for Plaintiffs' litigation where, as the district court found, the Department of Justice intervened at the eleventh hour and added nothing to the Plaintiffs' case.

3. Did the 13% reduction in the fee award by the Court of Appeals correct the minor problems in the Plaintiffs' record keeping.

LIST OF THE PARTIES TO THE PROCEEDINGS

Defendants:

The City of Houston, Texas	
Members of the Houston City Council:	
Frank Mann	Houston, Texas
Johnny Goyen	Houston, Texas
Judson Robinson, Jr.	Houston, Texas
Larry McKaskle	Houston, Texas
Louis Macey	Houston, Texas
Homer Ford	Houston, Texas
Frank Mancuso	Houston, Texas
James Westmoreland	Houston, Texas
Jim McConn	Houston, Texas

Plaintiffs:

Moses Leroy	Houston, Texas
Mickey Leland	Houston, Texas
Lawrence L. Pope	Houston, Texas
Joe Perez	Houston, Texas
Joe Padilla	Houston, Texas
Hector Garcia	Houston, Texas
Don Horn	Houston, Texas
Harris County Council or Organizations	Houston, Texas
Harris County Women's Political Caucus	Houston, Texas
Political Association of Spanish Speaking Organizations	Houston, Texas
Greater Houston Civic Houston	
Ben T. Reyes	Houston, Texas
H. L. Garner	Houston, Texas
J. L. Marshall	Houston, Texas
Anthony Hall	Houston, Texas
Tom Rodriguez	Houston, Texas
Tom Bass	Houston, Texas
Herman Lauhoff	Houston, Texas

Bebe Bruce	Houston, Texas
Mike Noblet	Houston, Texas
Joe Pentony	Houston, Texas
Don Horn	Houston, Texas
John W. Taylor, Jr.	Houston, Texas
John Hughey	Houston, Texas
Neil West	Houston, Texas
Jim Dunne	Houston, Texas

A Class Composed of all Black Residents of the City of Houston

A Class Composed of all Mexican American Residents of the City of Houston, Texas

Counsel for the Plaintiffs:

George J. Korbel	San Antonio, Texas
Jesse Botello	San Antonio, Texas
L.A. "Al." Greene	Houston, Texas
Law Office of Frumencio Reyes Juan Aldape	Houston, Texas
Law Office of Craig Washington	Houston, Texas
Sidney Bracquet	Houston, Texas
David Boddie	Houston, Texas
Regina Temple	Houston, Texas
Larry Evans	Houston, Texas
Hogan & Hartson	Washington, D.C.

Attorneys of Record for the Respondents

Counsel for the City of Houston:

Jerry E. Smith
City Attorney — Houston, Texas
Robert J. Collins
Senior Asst.
City Attorney — Houston, Texas
John E. Fischer
Senior Asst.
City Attorney — Houston, Texas

Attorneys of Record for the Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No.87-1611

In The

Supreme Court of the United States

October Term, 1987

THE CITY OF HOUSTON, ET AL.,

Petitioners,

v.

MOSES LEROY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Moses Leroy et al. respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That is reported at 831 F. 2d 576. The opinion of the district court is reported at 648 F.Supp. 537. Both are reprinted in the Appendix to Petition for Certiorari.

OTHER REFERENCES

The parties will be referred to as "Plaintiffs" and "the City." Plaintiffs are the persons who brought suit to force the City of Houston to adopt single member dis-

tricts and now have been granted an award of attorneys' fees. The Petitioner for Certiorari, defendant before the district court, is the City of Houston. It will be referred to as "the City" or as "Houston."

References to the opinions below will be to the published versions with cross reference to the Appendix to the Certiorari Petition. Reference to the "Transcript of Proceedings" of the eleven day hearing on attorneys' fees will be cited as "Tr." with the Volume as Roman Numeral and the page number as an Arabic Number. Plaintiffs' exhibits are referred to as "Px" and Defendants' exhibits as "Dx" with the exhibit number.

———o———

STATEMENT OF JURISDICTION

This Court Lacks Jurisdiction Because the Petition For Certiorari was not Timely Filed

Rule 20.4 of the Supreme Court provides as follows:

> .4 The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on rehearing.

The opinion of the Court of Appeals for the Fifth Circuit was rendered on November 12, 1987. Thereafter, on November 23, the City requested and was granted an

extension of time to December 10, 1987 for filing a Petition for Rehearing. Under Fifth Circuit Local Rule 27.16, this request was granted by the clerk. On December 10, 1987, the City filed a Suggestion for Rehearing En Banc but did *not* file a Petition for Rehearing. Thereafter, Houston did not request that this Court grant an extension of time in which to file a Petition for Certiorari.

Since the City filed no Petition for Rehearing, Rule 20.4 in conjunction with 28 U.S.C. Sec. 2101(c) requires that a Petition for Certiorari be filed within 90 days after "the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate." In this situation the docket sheet of the Court of Appeals indicates that the opinion of the Fifth Circuit was filed on November 12, 1987. Counting 90 days from that date, the time expired on February 11, 1988. Here, it is clear from the affidavit of counsel that service by mail of the petition for certiorari was not attempted until March 28, 1988. The petition is out of time and "must . . . be denied for want of jurisdiction." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412 (1943).

A Petition for Rehearing and a Suggestion for Rehearing En Banc are not the same and are covered by two separate appellate rules (FRAP 35 for Rehearing En Banc and FRAP 40 for Rehearing). Indeed, Local Rule 35.2 of the Fifth Circuit specifically prohibits the filing of a Request for Rehearing and a Suggestion for Rehearing En Banc in the same document:

> Local Rule 35.2 Form of Suggestion. The suggestion shall not be incorporated in the petition for rehearing

before the panel, if one is filed, but shall be complete in itself.

Stern and Gressman's treatise on Supreme Court practice specifically deals with the question of whether filing only a Suggestion for Rehearing En Banc will stay the running of the time for filing of a petition for certiorari and concludes:

> *A "Suggestion," authorized by Rule 35 of the Federal Rules of Appellate Procedure, that the Court of Appeals rehear the panel's decision en banc does not have the effect of a petition for rehearing, and thus by itself does not extend the time to petition for review by the Supreme Court.* Rule 35(c) states that "the pendency of such a suggestion . . . shall not affect the finality of the judgment of the court of appeals." [Emphasis added]

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice Sec. 6.3 at 313 (6th Ed. 1986).

In civil cases, which are governed by 28 U.S.C. Sec. 2101(c), the time limit of 90 days has been treated by this Court as jurisdictional and "no waivers are recognized . . ." R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice Sec. 601 (d) at 306 (6th Ed. 1986); see also *Deal v. Cincinnati Bd. of Ed.*, 402 U.S. 962 (1971) (Mr. Justice Douglas, dissenting) and *Teague v. Commissioner of Customs*, 394 U.S. 977 (1969) (Mr. Justice Black dissenting).

We would expect that Houston will argue that the Order of the Fifth Circuit on the City's Suggestion for Rehearing En Banc which was denied on December 22, 1987 but not filed by the clerk until December 28 had the same effect as if the City had filed a "Petition for Re-

hearing" because in the form denial Order of the Fifth Circuit reads:

> (X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in the active regular service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

A copy of the Order of the Fifth Circuit "On Suggestion for Rehearing En Banc" is found in Petitioners' Appendix D at 123a.

The Rules of this Court and 2101(c) clearly limit the stay of the running of the certiorari period to situations in which a party has filed a petition for rehearing. Here, there was no Petition for Rehearing filed by either party. Rather, the Court of Appeals, after the expiration of the period in which a petition for rehearing could be filed, made use of a form order stating that it was treating a "Suggestion for Rehearing En Banc" as a "petition for panel rehearing." The statute and rules specifically require that a party file a Petition for Rehearing to stay the running of the 90 day period. This time period has been strictly construed by the Court. *Deal v. Cincinnati Bd. of Ed.*, 402 U.S. 962 (1971) (Mr. Justice Douglas, dissenting). Here no party filed a Petition for Rehearing. Therefore, it should be irrelevant how the Fifth Circuit treated the City's Suggestion For Rehearing En Banc.

———o———

STATEMENT OF FACTS

1. Overview

This matter involves an award of attorneys' fees to Plaintiffs who brought three actions against the City of Houston in which they sought to have the at-large council election system changed into single-member districts. Although Mexican Americans and Blacks accounted for nearly 40% of the city population, only one Black and no Mexican Americans had ever been elected to the city council. As the district court found, Plaintiffs tried virtually every avenue to change the system short of litigation. (648 F. Supp. 548-549, App. A 24a-26a).

In 1966, a charter revision commission recommended the adoption of single-member districts. (*Mann* Tr. Vols. I at 1-71; XI at 28-32; XVII at 170). The Houston city council took no action upon this recommendation. (*id*). In 1973 and 1975, minority state representatives, including two who were named Plaintiffs, introduced bills to compel single-member district elections in Houston. (648 F. Supp. 548-549, App. A 24a). Although similar legislation led to the adoption of single-member districts for the Houston I.S.D., the City used its lobbyists and influence to defeat these bills. (*id*). In 1975, just prior to the trial on the merits of the *Mann* single-member district case, a "straw vote" was held in which the question of single-member districts was presented to the people of Houston. Fifty-six percent of the voters favored single-member districts. As with the recommendations of the charter revision commission, the Houston city council took no action. (648 F. Supp. 548, App. A 24a).

In 1973, this Court affirmed the holding that at-large state representative districts in Dallas and San Antonio were illegal because such systems made it more difficult for minority voters "to participate in the political process and to elect representatives of their choice". *White v. Regester*, 412 U.S. 755, 766 (1973). Shortly thereafter, the Plaintiffs filed *Greater Houston Civic Council v. Mann*, No. H-73-1650 (S.D. Tex.) (*Mann*) as a Constitutional and statutory attack on the at-large City Council elections in the City of Houston.

In 1975, while Plaintiffs were awaiting a trial setting in *Mann*, the preclearance provision of the Voting Rights Act of 1965 (as amended in 1975) 42 U.S.C. Sec. 1973(c) was extended to cover Texas. Although the Act had been effective in August of 1975, the City took no steps to comply with its duty to preclear annexations before the beginning of the election process for the November 1975 City Council elections. Accordingly, the named Plaintiffs in *Mann* filed suit to force compliance and again demanded that the City adopt single-member districts. *Leroy v. City of Houston*, No. H-75-1731 (S.D. Tex. Oct. 1975) (*Leroy I*). After Plaintiffs filed suit, but prior to the actual receipt of service, the City began the process of submission. The three-judge court convened, refused to enjoin the election but indicated that if the Department of Justice entered an objection, new elections would be ordered. Thereafter, no objection was entered. Plaintiffs sought fees for this case in 1976 and were denied by the three-judge court on the ground that the ultimate goal of the plaintiffs was single-member districts and since that had not resulted, Plaintiffs did not prevail. (Dx 4). Plaintiffs took no appeal from this Order.

Mann came to trial in the later part of 1976. Testimony continued for five and one-half weeks. The City spent more than $250,000.00 on outside experts and an additional half million dollars in staff time preparing for and trying the case. (648 F. Supp. 570, App. A 75a). The district court found against the Plaintiffs in 1977. *GHCC v. Mann*, 440 F. Supp. 696 (S.D. Tex. 1977). The Plaintiffs appealed to the Fifth Circuit and were joined in an Amicus Brief filed by the Department of Justice urging that the district court's opinion be vacated because of improper and incomplete applications of the standards set down in *White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen*, 485 F. 2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carrol Parish v. Marshall*, 424 U.S. 636 (1976).

In considering the Plaintiffs' request for fees, the district court reviewed the 1977 opinion in *Mann;* the relevant Fifth Circuit precedent at the time; listened to the testimony of the witnesses and examined the documents offered as exhibits. The court found that the City was not only expecting a remand of the *Mann* case but had taken various steps, including spending $63,000.00 to hire expert witnesses to prepare for an expected retrial. (648 F. Supp. 549, App. A 26a-27a). This finding was affirmed by the Court of Appeals. *Leroy v. City of Houston,* 831 F. 2d 576, 583, App. C 113a.

In 1977 and 1978, while the appellate briefing was going on in *Mann,* the City made a series of additional annexations, failed to submit them for preclearance and then proceeded to set a special election. The Plaintiffs filed under Section 5 of the Voting Rights Act to enjoin the election unless and until the annexations were precleared.

Leroy v. City of Houston, H-78-2174 (*Leroy II*). Two months after Plaintiffs initially brought this matter before the district court, the Department of Justice filed a separate suit and moved to consolidate its suit with *Leroy II*. The motion was granted and the cases were consolidated under the *Leroy II* style and docket number. On the morning of the hearing on the Plaintiffs' request for a preliminary injunction in *Leroy II*, the Houston City Council held a special meeting and passed a resolution "postponing" the election. (648 F. Supp. 533, App. A 35a; see also Dx. 11). At the Preliminary Injunction hearing held that afternoon, the City provided the three-judge district court with a copy of the resolution postponing the election. The City assured the three-judge court that the submission of the annexations would be attended to and that no elections would be held until there was compliance with the preclearance provisions of the Voting Rights Act.

Accordingly, the three-judge district court found that it was unnecessary to enjoin the election since the city had cancelled it. (648 F. Supp. 553, App. A 35a). Some months later, the Department of Justice entered a Voting Rights Objection to the annexations. In spite of the objection, the City set yet another election. (648 F. Supp. 553, App. A 35a). Plaintiffs requested and were granted an injunction against the holding of this election. (*id*). At this point the City threw in the towel and concluded the ongoing negotiations with the Plaintiffs on a plan of apportionment. (648 F. Supp. 562, App. A 55a-56a). The district court found that "the City made concessions to the plaintiffs regarding the drawing of lines for the various districts" and agreed to include "an escalator clause" which results in a growth in the number of dis-

tricts as Houston continues its population expansion. (*id*). This negotiated plan of apportionment was then offered as a Charter Revision Referendum and was passed.

There was no doubt in anybody's mind at that time about the impact of the Plaintiffs. The counsel for the City informed the district court, this "referendum issue [was] the very relief which they [Plaintiffs] seek to obtain through constitutional and Voting Rights Act Litigation." (City's Motion to Dismiss at pages 2-4 filed Dec. 8, 1978, cited in docket entry 21 on *Leroy II* docket sheet). At the first election after the city changed to district elections, two of the named plaintiffs, including the first Mexican American and three Blacks were elected to the council.

Thereafter, the Fifth Circuit considered the appeal which had been pending in *Mann*. Since the remedy sought by the Plaintiffs had been obtained, that Court felt that the case was moot and remanded it for a consideration of attorneys' fees. (831 F. 2d 576, App. C 102a).

The Fee Proceedings

The attorneys' fees phase of this case began in 1982. The City attempted to sever the hearing on these interrelated cases (*Mann, Leroy I*, and *Leroy II*). This was denied. *Leroy v. City of Houston*, 584 F. Supp. 563 (S.D. Tex. 1984). No appeal was taken from this order. The district court set five final hearing dates and continued four of them on the City's Motions because the City had done no discovery and was not ready. On June 15, 1984 when the district court denied the fourth motion of the City to continue, the final hearing began as scheduled and

proceeded through the morning. Prior to the noon recess, the district judge urged the parties to try again to settle the case. The parties met, obtained authority and worked out what was announced to the court as a settlement. (Tr. June 18 at 2). It was agreed that the City would settle with the Plaintiffs for $550,000.00, $150,000.00 to be paid immediately with the balance due over a period of four years at the statutory interest rate. (*id.* LL 7-22).[1]

The parties informed the court, however, that formal approval for the settlement would have to be made by the Houston City Council in official session and that the Senior Assistant City Attorney, who had handled the cases from their inception more than ten years earlier would take care of that. (*id.* at 3). Counsel for the City assured the district court that while it was too late to get the settlement on the agenda for the following day that it would be taken care of as soon as possible and "would pass." (*id.* at 4).

On July 11, almost a month after the settlement was announced in open court and without carrying through on the agreement to present the settlement to the city council, the Houston City Attorney personally appeared for the first time in the case and filed a request for a Mandamus

---

[1]Normally, settlement negotiations would not be a part of the record and would not be appropriate to mention in this brief. However, the City mentions the "aborted settlement" in its statement of the case. Petition for Certiorari at 8. In addition, the "settlement" was announced in open court and a copy of the letter from the City Attorney of Houston reneging on the settlement was sent to the district court. At the hearing on fees, the Plaintiffs offered testimony on the settlement and here was no objection from the City. The district court also mentions the problem of the "settlement" in the opinion. See generally 648 F. Supp. 568, App. A 70a.

with the Fifth Circuit seeking to have the district judge recused.

After filing the Mandamus, the city attorney sent a letter to counsel for the Plaintiffs with a copy to the district court refusing to comply with the settlement. This entire process of first agreeing to settle, attempting to mandamus the recusal of the Judge and then reneging on the settlement is referred to in the City's brief as "further skirmishes between the parties including an aborted settlement and an attempted recusal. . . ." Petition at 8. On October 10, 1984, the Fifth Circuit refused to grant the Mandamus. *In Re City of Houston*, 745 F. 2d 925 (5th Cir. 1984). Thereafter, the Senior Assistant Attorney, who had represented Houston from the day *Mann* was filed in 1973 through the day the settlement was announced in open court in 1984, moved and was allowed to withdraw as counsel.

With new lawyers at the helm of the defense, Houston again moved to continue and to reopen discovery. The motion was granted and the City proceeded with discovery including several days of depositions. The final hearing on the merits began on April 17, 1985. Ten days of testimony followed. The witnesses included the two persons who were the Mayors of Houston during the time the Plaintiffs' litigation was pending; several members of the Houston City Council (from that same period as well as current members) and the two City Attorneys who were advising the Mayor and City Council during that same period. At the fee hearing, in spite of the history of resisting the various efforts of the Plaintiffs to adopt districts, the former city officials testified that, in fact, they

had been supporters of district elections all along and "that the political process would have eventually created those districts anyway." (648 F. Supp. 548, App. A. 24a). However, the district court found such representations to be "spurious" and that "litigation . . . was strategically the only way to achieve the adoption of single-member districts in Houston." (648 F. Supp. 557, App. A. 44a-45a).

On August 1, 1985, the district court filed an opinion and final judgment which is reported at 648 F. Supp. 537 and included in the Appendix to the Petition for Certiorari as Appendix A. Thereafter the City appealed to the Court of Appeals for the Fifth Circuit which affirmed the finding that the Plaintiffs' litigation in *Mann* and *Leroy II* had been a catalyst leading to the adoption of district elections but reversed the findings of the district court in *Leroy I*. The Fifth Circuit disallowed a small number of hours for administrative work, cut out the .15% multiplier which had been granted by the district court and rejected the award by the district court for plaintiffs' expert witnesses. Finally, the total remaining fee award was reduced by 13% to account for the manner in which records were in the 1973-1978 period. The decision of the Fifth Circuit is reported in *Leroy v. City of Houston*, 831 F. 2d 576 (5th Cir. 1987) and included in the Appendix to the Petition for Certiorari as Appendix C.

Reasons That The Petition For Certiorari Should Be Denied

Together *Mann* and *Leroy II* put tremendous pressure on the City to abandon the at-large election system. "*Mann*, although lost at trial by plaintiffs, was widely expected to be reversed and remanded and would pose a

continuing threat of judicial intervention in the City's districting." *Leroy v. City of Houston,* 831 F. 2d 576, 581 (5th Cir. 1987), App. C 107a. While "the issue of substantive district revision was pending in the [appellate] courts, pretermitting further assertion of such a cause of action [,] *Leroy II* sought and achieved the goal of requiring the city to submit major annexations for Justice Department approval." (*id.*), App. C 107a-108a.

Plaintiffs were then able to have the district court enjoin any further city elections placing "the status of the annexations and any bond elections . . ." in limbo. (*id*). As a result, the Plaintiffs had the City's electoral and tax collecting processes in shambles. Without dealing directly with the adoption of single-member districts, there could be no resolution of such important considerations as the upcoming city council elections, the need for a bond election as well as the question of whether the City would provide services and collect taxes in the annexed areas. The record indicates that the City fought long and hard, expending vast amounts of money, to retain the at-large structure. It was no holds barred and the City called upon a virtually unlimited budget to defend against the Plaintiffs' litigation. But in the end the Plaintiffs cut off all avenues and the City was forced to negotiate with the Plaintiffs. Single-member district elections and increased minority participation resulted. The Fifth Circuit put it in a nutshell when it found "the plaintiffs were, in sum, the irresistible force pressing upon the City as immovable object." 831 F. 2d 576, 581 (5th Cir. 1987), App. C 108a.

A. The City Has Offered No Suitable Reason For Granting Certiorari

The general considerations for Supreme Court review by writ of certiorari, as set out in Rule 17.1, have not been satisfied in this case. There is no allegation that the opinion of the Fifth Circuit is in conflict with the decision of another federal court of appeals. There is no allegation that the Fifth Circuit has decided an issue of law which has not been settled by this Court. Nor is there any allegation that the Fifth Circuit opinion is in conflict with a previous opinion of this Court. Although the City did not discuss or even mention Rule 17.1, the petition seems to suggest that the Fifth Circuit opinion represents a sufficiently serious departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

The City has presented three questions upon which it argues that Certiorari ought to be granted. The first involves whether the district court was clearly erroneous in finding that the Plaintiffs were a "substantial factor or a significant catalyst" in "motivating" the change by the City from at-large to district elections. This "catalyst" finding of fact was approved by the Court of Appeals with the observation "[t]hat plaintiffs eventually obtained the objective of their litigation is not seriously disputed." *Leroy v. City of Houston,* 831 F. 2d 576, 579 (5th Cir. 1987), App. C 104a.

The second question deals with whether attorneys' fees should be denied to successful Plaintiffs in *Leroy II* where, as found by the district court before whom the case was tried, the "Plaintiffs performed all the essentials

in the litigation at bar and then were joined at the eleventh hour by the Department of Justice [matter omitted]. "Every indication is that the plaintiffs made their own case even after the Department of Justice arrived, and that the Department did not actively represent the Plaintiffs." (648 F. Supp. 537, 557-558, App. A 46a). The Court of Appeals affirmed the findings of the district court on this matter. (831 F. 2d 583, App. C 113a).

The third question posed for certiorari is whether the total amount the fee award found by the district court and reduced by the court of appeals ought to be further reduced.

1. The Catalyst Question

In sum total, the City quibbles with the extensive fact-finding of the district court. The test applied by the district court to decide the prevailing party question involved a determination of whether or not the Plaintiffs' litigation was a "substantial factor or a significant catalyst" involved in "motivating" Houston to abandon the at-large election system under question. *Hennigan v. Ouachita Parish School Bd.*, 749 F. 2d 1148, 1152 (5th Cir. 1985) citing *Hensley v. Eckerhart,* 461 U.S. 424, 433 ff. (1983). This is a clear question of fact upon which the district court had the opportunity to listen to not only the evidence of the Plaintiffs but also to the testimony of the persons who were the Mayors, council members and City Attorneys of Houston during the time the litigation and adoption of district council election.

In *Pullman Standard v. Swint,* 456 U.S. 273, 287-88 (1982), this Court made it clear that a question involving

intent is a "pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." See also *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 534 (1979) (issue of intentional maintenance of a racially segregated school system a factual finding subject to the clearly erroneous rule). A fact-finding by the district court is not clearly erroneous "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous [citations omitted]." *Anderson v. Bessemer City,* 470 U.S. 564, 573-574 (1985).

Where, as here, the findings of the district court are based in part upon determinations of the credibility of witnesses "Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily upon the listener's understanding of and belief in what is said. [citations omitted]." (*id.* at 575).

Although they would like this Court to think so, the Plaintiffs' part in the ultimate causation has never seriously been questioned by the City. The petition for certiorari suggests that this Court ignore the findings of the trial court because it is claimed that none of the evidence on "catalyst" passes an undefined standard of "competency." This is true, Houston argues, because none of the City officials testified that the Plaintiffs' litigation had an effect

on their decision to abandon the at-large election system. Petition for Certiorari at 11.

Even if competency was the standard by which this Court considers a certiorari petition, the representations of the City are simply not the state of the record before the district court. There was an abundance of testimony upon which the district court found causation. Yet, the City persists in its attempt at obfuscation by arguing that "it is hard to see how [Plaintiffs'] litigation could have any influence upon the City's adoption of single-member districts, and the Plaintiffs produced no evidence to establish such a nexus." Petition at 14. Contrary to the bald assertions of the City, many of their own witnesses conceded that the Plaintiffs and their litigation played a role in bringing about districts. Former Mayor Hofheinz, a City witness agreed on cross-examination "I think that the lawsuit played a role. . . ." (Tr. Vol. VIII at 130 LL. 9-16) and "There were many influences, certainly this lawsuit was one of them." (*id.* at 136 LL. 10-12).

Another City witness was Mr. Jim McConn, who was the mayor at the time that districts were adopted. He conceded "It [Plaintiffs' litigation] probably had some effect. . ." (Tr. Vol. IX at 197 L. 77) "how big a role I just couldn't begin to answer." (*id.* at 198 LL. 11-13). Timothy Cooper, Houston's expert witness on the fee question conceded that the Plaintiffs obtained the result that they sought and only quibbled about whether it was an "extra-ordinary result." (Tr. Vol. IX at 150 LL. 17 ff. and at 155 LL. 10-18).

The district court observed that Robert Collie, the city attorney at the time that the districts were adopted

"stated that he felt that the Plaintiffs would keep on filing lawsuits until the city adopted single-member districts. (Tr. Vol. X p. 108)." (648 F. Supp. 558, App. A 48a).

Current city councilman and plaintiff Ben Reyes testified that the lawsuits were "the key to success in the creation of single-member districts in the city of Houston. I think that it was the only reason that we were able to get single-member districts." (Tr. Vol. III at 95 LL 18 ff) One of Plaintiffs' expert witnesses was Charles Dipple who specializes in municipal law and is the senior partner in one of Houston's most respected law firms. He represented clients opposed to single-member districts in Houston and frequently consulted with Houston City officials at the time that the decision was made to adopt single-member districts. Mr. Dipple testified: "Based upon my following them and my perceptions of what happened, I don't think that there is any question that the series of litigation [*Mann, Leroy I* and *Leroy II*] had a very compelling effect upon the single-member districts as we know them today. . . ." (Tr. Vol. II at 49 LL. 1-5). Jose Garza, the Director of Voting litigation for the Mexican Legal Defense and Educational Fund, another of Plaintiffs' expert witnesses testified that from his review of the evidence that Plaintiffs were "the impetus, the catalysts for the change in the election structure." (Tr. June 18, 1984 hearing at 51 LL. 8 ff).

The Senior Assistant City Attorney agreed in open court to settle the case for $550,000.00. If he did not believe that the Plaintiffs played a significant role in this matter, certainly the Senior Assistant City Attorney who had been with these matters from the very beginning would

not have made the representations he did to the district court.

As their only other example of the weakness of the record, the City argues at page 12 of its petition that a $63,000.00 contract to hire an expert witness, was not, as found by the district court, to be in preparation for the expected remand of *Mann*, but rather involved a lawsuit which was completely unrelated to *Mann*. (648 F. Supp. at 549; App. A 26a-27a). At the more than two week hearing on the fees, the City offered no explanation for this expenditure to hire the firm of Hamilton & Rabinowitz other than the one advanced by the Plaintiffs. After the Plaintiffs offered the contract for expert testimony into evidence, the district judge stated "Well, I guess we will hear from the city." (Tr. Vol. VIII p. 23 LL. 6-1). No witness for the City attempted to explain why the $63,000.00 contract for expert fees was not related to the expected remand. Although Dr. Rabinowitz was listed as a witness for the City at the fee hearing in this matter, she was not called. The City did not mention this argument in either of the appellate briefs filed in the Fifth Circuit. For the first time in its rebuttal before the Fifth Circuit, the City claimed that this hiring of expert witnesses related to a suit styled *Marvin Delaney v. City of Houston* and not to *Mann*. Here, the district court listened to all of the evidence and had an opportunity to review the contract in question. Then, the district court made specific findings as to what the contract meant and that it was related to the expected remand of the *Mann* case.

This is not just an attempt to have this Court second guess the fact-finder, it is a bold shot at having this Court

become the fact-finder. There was plenty of opportunity to offer evidence about the contract with Dr. Rabinowitz. The person who was Mayor when the contract was entered into was on the stand as was the City Attorney who was in charge of hiring Dr. Rabinowitz. No questions were asked and no evidence was offered by the City on this point.

In fact, however, this is just an attempt to throw a red herring into the matter since *Delaney* was an inconsequential suit filed in 1977 which had nothing to do with the at-large/single-member district question. To argue that the $63,000.00 was spent on the *Delaney* case is again simply not the record. For example, an examination of the contract itself indicates that it specifically refers to "analysis [of] the electoral success achieved by members of minority groups [in Houston] . . . and under alternative [electoral] structures employed elsewhere in the nation." (Px 32).[2]

---

[2]Nor is it even logical to conclude that this $63,000.00 would have been spent to prepare for the trial in *Delaney* because the contract was dated October of 1978 with performance dates spread out during 1979. (Px 32). After the City brought *Delaney* up in their oral argument to the Fifth Circuit, counsel for respondents checked the docket sheet in the *Delaney* case. There are no docket entries in the *Delaney* case after September of 1978 beyond ministerial docket sheet in the *Delaney* case. There are no docket entries in the *Delaney* case after September of 1978 beyond ministerial ones dealing with docket control. This is because the plaintiffs in *Delaney* abandoned their suit and filed a motion to intervene in *Leroy II*. Their Motion to intervene was subsequently denied. Thus, the contract with Hamilton and Rabinowitz was entered into in October of 1978 after the *Delaney* plaintiffs for all intents and purposes abandoned their litigation and later attempted to get into *Leroy II*.

2. Leroy II

The City argues that the intervention of the Department of Justice in *Leroy II* is a special circumstance which should result in the denial of the fees sought in *Leroy II*. In effect, the City argues that when the Government intervened at the "eleventh hour" (648 F. Supp. 558, App. A. p. 46a), the private Plaintiffs should have folded up their tents, gone home and let the Justice Department handle it. No court has ever found that the intervention of the Department of Justice in a suit brought by private parties should result in a denial of fees. To so hold would be a dangerous precedent because it would discourage the private enforcement of civil rights laws.

In any event, the district court had the special opportunity to not only hear the testimony of the witnesses in this case but to have been the managing judge of the three judge court which considered the *Leroy II* case. The district court found that the Plaintiffs did not just sit on their hands after the Department of Justice came into the *Leroy II* case. Rather Justice did nothing but duplicate the actions of the Plaintiffs (648 F. Supp. 557-558, App. 46a). The Government "merely intervened to add its voice on the side of the Plaintiffs [citation omitted]. "The plaintiffs did the substantive work." (648 F. Supp. 553, App. 35a).

3. The Amount of the Fee

The final argument made by the City is that the Fifth Circuit did not reduce the award of the district court enough. Basically, the Court of Appeals disallowed the modest .15% multiplier granted by the district court, cut out the award made for Plaintiffs' expert fees citing this

Courts' opinion in *Crawford Fitting v. J. T. Gibbons*, — U.S. —, 107 S. Ct. 2494 (1987), excluded the comparatively small number of hours spent by the Plaintiffs dealing directly with the Department of Justice and reversed the award for the time spent on *Leroy I*. In addition, the Circuit reduced the remaining award by 13% to take care of the City's complaints that the Plaintiffs did not keep adequate records.

The total effect of the action by the Court of Appeals was to reduce the Plaintiffs' fee award by almost $300,000.00 which represents just under 30% of the district court's award. The City grumbles that the reduction is not sufficient.

Houston deals with this argument by first claiming that the award to the Plaintiffs is nothing short of a windfall. Next the City claims that the way in which Plaintiffs maintained time records should have resulted in a reduction of more than that found appropriate by the Fifth Circuit. Finally Houston complains that the average per hour award of $157.00 is excessive. We will treat these three matters in reverse order.

A. The Per Hour Amount Is Reasonable and Supported by the Record.

The record before the district court included the testimony of the Plaintiffs' expert, Mr. Charles Dipple, the managing partner in Sears & Burns, a well respected Houston law firm which deals extensively with municipal law. Based upon his experience dealing with other lawyers; his knowledge of certain surveys which had been undertaken on fees charged by Houston law firms. (Tr. Vol. I at 135 L 10); and his experience in defending litigation such as this (*id.* at 126 LL 18 ff), he testified that in

Houston, the appropriate rate for experienced counsel in cases such as this would be $250.00 per hour (Tr. Vol. 1 at 136 L 2). He and the partners in his firm charge that rate for similar work. (Tr. Vol. II at 86 L 25 ff).

The Court also considered the survey published in 1984 (648 F. Supp. 537, App. 80a) which found that the rates for experienced attorneys in Houston ranged up to $250.00 per hour. National Law Journal's Directory of the Legal Professions New York Law Publishing Co. 1984. Mr. Robert Collie who was offered by Houston on other issues testified that the range of his fees was $170.00 to $225.00 per hour. (Tr. Vol. X at 92 LL. 6-13). See also *Wheeler v. Mental Health and Mental Retardation Authority*, 752 F. 2d 1063, 1073 (5th Cir. 1985) where it was conceded by counsel for the defendant that an appropriate fee rate in Houston would be $90.00 to $190.00 and *League of Latin American Citizens v. Seguin I.S.D.*, NO SA-83-CA-2222 (W.D. Tex. San Antonio Div. Sept. 4, 1987) at 4 where the court awarded Mr. Korbel $200.00 per hour. Here, the district judge awarded fees in the range of $60.00 to $200.00. The average fee for all lawyers worked out to $181.00 per hour.[3]

---

[3]The district court found that lawyers in Houston with experience such as Mr. Greene, Mr. Korbel and Mr. Washington charge fee rates which range from $165.00 to $250.00 per hour (648 F. Supp. 537, 571, App. A. p. 77a n. 30) and then proceeded to find that an appropriate fee for these more experienced counsel was $200.00 per hour. (648 F. Supp. 571-574, App. A 77a-75a). Mr. Greene has been a lawyer for more than 20 years and was broad certified specialist at the time of the trial in *Mann*. Mr. Washington has been an attorney for more than 15 years and a member of the state legislature since 1971. Mr. Korbel

(Continued on following page)

Houston offered only one expert on the area of fees, Mr. Timothy Cooper, an associate in the Houston firm of Bracewell and Patterson. On direct examination he not only testified that the number of hours spent by the Plaintiffs was reasonable but also that an appropriate award for the more experienced attorneys in this case would be $150.00 per hour. (Tr. Vol. IX at 57-58). The effect of the 13% reduction made by the Fifth Circuit is an average of $157.00 per hour. Thus, the City appears, here, to be quibbling about $7.00 per hour. When the City's own expert concedes that the more experienced Plaintiffs' attorneys are worth $150.00 per hour, the

---

(Continued from previous page)

has been involved in a large number of reapportionment and single member district cases. He has been an attorney for eighteen years and the City' expert admitted that Mr. Korbel is "highly competent" and well respected "litigator in the field of voting rights." (Tr. Vol. IX at 156, LL 24 ff) The district court also awarded the sum of $200.00 per hour to the members of the Washington D.C. law firm of Hogan and Hartson. Their fee petition indicates that they had experience ranging from more than four to over twenty years. The district court found that their work merited a fee equivalent to that found appropriate in Houston for experienced attorneys.

Although Mr. Botello had been admitted to practice for only one year at the time *Mann* came to trial, he had previously been employed by the Mexican American Legal Defense and Educational Fund. In that capacity, he had been responsible for preparation of expert witnesses and designed the proof plan utilized in *Graves v. Barnes,* 343 F. Supp. 704 aff'd in relevant part *sub nom. White v. Regester,* 412 U.S. 755 (1973). In addition, he is the author of a book on voting litigation. The district court found that his "skills in this area are unparalleled. . . ." 648 F. Supp. 573, App. A 82a. The court determined that an award of $150.00 per hour would be more appropriate because of the fact that he was less experienced than the other main counsel. (*Id.*) Other less experienced attorneys were awarded fees which ranged from $60.00 to $135.00 per hour.

cases cited in the long footnote on page 17 of the petition can be of little help.

B. The Time Records Are Sufficient

The City argues at 19 of its petition that Plaintiffs' total fee should be reduced more than 13% because "the woefully deficient time records submitted by Plaintiffs' attorneys in this case . . . results in an excessive fee." The purpose of requiring time records is to insure that the Plaintiffs are not awarded fees for excessive numbers of hours. By so arguing, the City attempts to impeach its own expert who testified on *direct examination* that the "overall" number of hours spent by the Plaintiffs was "reasonable." ("overall it does not look to be unreasonable in terms of hours." (Tr. Vol. IX at 67 LL 21-22; "yes, as I indicated the time was—I felt that the time was, generally, all right." *id.* at 154 LL 1-2.). This confirmed the testimony given by Plaintiffs' expert Jose Garza, Texas Regional Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF) as well as that organization's Voting Rights Project Director. He stated that the number of hours claimed by the Plaintiff was "extremely reasonable for the complicated nature of these cases." (June 18, 1984 Tr. at 33 LL 7-10).

Nor is the time excessive on its face. Houston admits to having used 19 lawyers and almost 2,000 hours of attorneys time (on the merits of these cases alone) in addition to more than $255,000.00 in expert fees and $500,000.00 in city staff time (exclusive of city attorney time) in its defense of Plaintiffs' litigation. (648 F. Supp. 570, App. A 75a and Tr. Vol. VII at 56 LL 3 ff). In context, the $255,000.00 for experts was found by the

district court to be eighteen times more than the City has ever spent for experts in any other case. (648 F. Supp. 648 F. Supp. 567, App. A p. 68a).

Although the district court would have preferred the time records for the early years to have been in a different form, it found "that the records themselves adequately reflect the tasks for which the Plaintiffs' lawyers performed and the time those tasks took to perform. . . ." (648 F. Supp. 569, App. A 73a).

In fact, the Plaintiffs kept extensive time records. The record indicates that Mr. Green kept contemporaneous time records at all times. (Tr. Vol V at 68 LL 19 ff) Since 1981, these records have been maintained on his office computer. *(id.* at 70 LL 14-18) Prior to that time, the records were kept manually and have now been transferred to the computer. *(id.)* Mr. Botello and Mr. Korbel kept contemporaneous notations of time spent on notes in the files which counsel maintained in this case. (Tr. Vol. II at 157 LL 20-25; Vol. XII at 169 LL 8-14).[4] For time keeping after January 1, 1983, Mr. Korbel began keeping hourly contemporaneous computer time records which are maintained on computer disc storage. A printout of these records was made available to counsel for the city. (Tr. Vol. VII at 168 LL 21 ff). It is Mr.

---

[4]In 1976, Botello and Korbel spent several weeks preparing to try the *Mann* case and kept records which documented tasks by the day. In other words, all things done in the day were accounted for but the records did not indicate the exact time in the day that the task was performed. Mr. Korbel testified that this was the same procedure which he had followed in time keeping for the fees affirmed by the Fifth Circuit in *Graves v. Barnes*, 700 F. 2d 220 (5th Cir. 1984). Tr. Vol. VII at 169 LL 18 ff.

Botello's practice to keep contemporaneous records on a legal pad which are then transferred to formal statements for client billing. (Tr. Vol. II at 157 LL 19 ff) . The records in this matter were available but the counsel for Houston never requested them. *(id.* at 189 LL 11 ff) Mr. Washington and his firm currently keep detailed contemporaneous time records on an office computer system and prior to that used a manual system of record keeping. (Tr. Vol. III at 64 LL 11). Only Mr. Reyes reconstructed his claim for fees by going through his notes from the trial, the appearances which he made, and conferences which he attended. (Tr. Vol. II at 129 LL 21 ff).

The records kept by the Plaintiffs clearly meet the standard set out by this Court in *Hensley v. Eckerhart,* 461 U.S. 424, 437 n. 12 (1984) "Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures."

D. This Is Anything But A Windfall

The Plaintiffs have been involved with litigation against the City since 1973 in this matter. While the number of hours and the fee award is large, the tactics employed by the City were isolated by the district court as the cause of the problem. The district court found the actions of the City to have consistently "protracted . . . the resolution of this case" through the use of "stalling tactics." (648 F. Supp. 568, App. A 70). Houston "lacked openness and candor in discovery" (648 F. Supp. 567, App. A 68a); refused to cooperate in discovery (*id.*, App. A 68a-69a); "removed . . . official election re-

turns from the public records" forcing Plaintiffs to resort to seeking an opinion from the State Attorney General under the Texas Open Records Act (*id.*); "flout[ed] promise[s]" made in open court (*id.*, App. A 67a); forced Plaintiffs to resort to "protracted legal maneuvers" to try the cases (*id.*, App. A 68a); consistently delayed proceedings because they were unprepared and refused to comply with the terms of a settlement announced in open court. (648 F. Supp. 568, App. A 70a). Even the City's own expert on fees criticized the City for its tactics. (*id*). The overall conduct of the City was termed by the district court to be "deplorable" resulting in an increase the number of hours necessary to try the issues. (648 F. Supp. 568, App. A 69a).

The City chose to make even the fee proceedings, which began in 1982, into a second major litigation. There were extensive interrogatories, depositions, and motions to produce. When the City refused again to cooperate with discovery, Plaintiffs were forced to move for sanctions which were granted by the district court. As previously indicated, the City even filed a request for mandamus in the Fifth Circuit to remove the district judge. The City sought and received four continuances because it had failed to conduct discovery and was unprepared. These continuances were always sought at the very last moment requiring Plaintiffs to go through five full preparations. By continuing to seek continuances and extensions of time, delaying, and generally being non-cooperative, the City has been able to string out the fee proceedings for almost six years. While the City may opt to handle everything the hard way, it should not now be heard to complain that

its actions have substantially increased the amount of the award.

—o—

CONCLUSION

Houston failed to file its petition for writ of certiorari within the time specified by 28 U.S.C. § 2101(c). Accordingly the petition ought to be dismissed as untimely filed.

Even if the petition would have been timely filed, it ought to be denied. Houston now elects its representatives by district and the trial court made fact-findings that the Plaintiffs were a significant catalyst in the change from the at-large system. The Fifth Circuit affirmed this catalytic finding. This case presents no conflict between this Court and any of the Circuit Courts and no important federal issues which should be decided by this Court.

Respectfully submitted,

George J. Korbel
220 Gardenview
San Antonio, Texas 78213

Jesse Roy Botello
515 South Main
San Antonio, Texas 78204
(512) 225-5346

L.A. "Al" Greene Jr.
535 Marathon Oil Tower
5555 San Felipe
Houston, Texas 77056
(713) 529-7700

Attorneys for Respondents

NO. 87-1611

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE CITY OF HOUSTON, ET AL.,
Petitioners

v.

MOSES LEROY, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ROBERT J. COLLINS
Senior Assistant City Attorney

JOHN E. FISHER
Senior Assistant City Attorney

P. O. Box 1562
Houston, Texas 77251
Telephone (713) 247-2000

Attorneys for Petitioners

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

I. THE PETITION FOR CERTIORARI WAS TIMELY FILED AND IS PROPERLY BEFORE THE COURT.

Plaintiffs' argument that the Petition for Writ of Certiorari was not filed timely (Brief at 2-5) merits little response. Counsel for Plaintiffs are either entirely unfamiliar with the Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit or they are attempting to mislead this Court. Plaintiffs cite Local Rule 35.2 to the effect that a Petition for Rehearing and a Suggestion for Rehearing En Banc are not the same. However, they ignore the fact that, pursuant to that Court's Internal Operating Procedures, the standard treatment by the Court of Appeals of the "Suggestion" is as a Petition for Rehearing. These procedures provide in pertinent part:

> "Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the Court, the filing of a suggestion for rehearing en banc does not take the case out of the plenary control of the panel deciding the case. *A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.*"
>
> * * *
>
> "If after expiration of the specified time for requesting a poll the writing judge of the panel has also not received a request from any active member of the Court, *the panel, without further notice, may take such action as it deems appropriate on the suggestion.* However, in its order disposing of the

> case and the suggestion, the panel must enter an order denying suggestion for rehearing en banc showing no poll was requested by any judge."
> (Emphasis added.)

As one treatise puts it:

> "In this context, finality relates not to the final or interlocutory nature of the judgment on the merits but to the finality of the action taken by the lower court. If a rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. *Only when there is such certainty can the judgment properly be made the subject of a petition for certiorari and thus it is that the time for petitioning for certiorari commences on the date when certainty and finality attach to the action taken by the lower court.*" R. STERN, E. GROSSMAN AND S. SHAPIRO, SUPREME COURT PRACTICE, at 313 (6th Ed. 1986).
> (Emphasis added.)

Thus, under the procedures of the Court of Appeals,[1] a Suggestion for Rehearing En Banc affects the finality of the judgment until there is action by the panel, because there is no certainty as to whether the Court's judgment will be modified or not.

II. RESPONDENTS' STATEMENT OF FACTS CONTAINS ERRORS AND OMISSIONS.

Plaintiffs portray the City of Houston as apathetic or even recalcitrant in the face of its legal obligations under

---

1. Here, the Plaintiffs do not challenge the validity of the procedures in the Court of Appeals; they merely ignore them. Such ignorance of procedure would be understandable for *pro se* litigants, but not for experienced attorneys claiming entitlement to fees in the range of $200 to $250 per hour. The jurisdictional argument is clearly frivolous.

the Voting Rights Act and leave the inference that only because they filed *Leroy I* did the City make the required submission. (Brief at 7) However, the City did not begin "the process of submission" after the suit was filed but rather, as the three-judge Court found, it had expeditiously prepared and completed the submission and mailed it to the Attorney General on October 16, 1975, within 8 days of the filing of *Leroy I*. (Opinion of the Court on Preliminary Injunction, entered November 6, 1975, at 3.)

Plaintiffs have consistently contended that the City had called an election without preclearance of certain annexations and that this action necessitated the filing of *Leroy II*. (Brief at 8-9.) However, the actions of the City were not legally sufficient to call an election under Texas law.[2] Thus, Plainitffs' suit was premature and the District Court found nothing to enjoin. Subsequent to the Justice Department's objection, the City did not blithely call a second election, as Plaintiffs assert. (Brief at 9.) Having negotiated with the Justice Department regarding a mixed plan of nine district council positions and five at-large positions, the City put the nine/five charter amendment on the ballot along with other issues. All of these issues were submitted for preclearance and the Justice Department approved holding an election on the nine/five issue but objected to the other propositions. (DX-23.)

The City had taken final action in calling the election on all eight issues and state law did not provide a method of "uncalling" an election. The City informed the Justice

---

2. See Chapter 9 of the Texas Local Government Code and Section 44.001 of the Texas Election Code; TR. II-69-70, 72; V-55, 116-120. This issue was discussed at more length in Appellants' Brief before the Court of Appeals at 14-16.

Department that, absent an injunction, it would have to proceed with the election as called on all issues. The Justice Department then moved in *Leroy II* for an injunction to prohibit holding an election on any issue but the nine/five plan. (DX-16.)

Thus, the record is clear that Plaintiffs' request for injunction in *Leroy II*, duplicating that of the Justice Department, did not cause the City to "throw in the towel" and negotiate with the Plaintiffs.[3] (Brief at 9.) Leaving aside the Justice Department's role in the proceeding, the injunction issued did not force the City to place the nine/five proposal on the ballot and therefore, was not a catalyst in the adoption of single member districts.

Finally, Plaintiffs assert that: "There was no doubt in anybody's mind at that time about the impact of the Plaintiffs." (Brief at 10.) This is probably correct. The record is clear and even the District Court recognized that the real factor in forcing the City to single member districts was the actions of the Justice Department. (648 F. Supp. at 554; App., p. 38a.) The Plaintiffs were, at best, camp-followers.

III. PETITIONERS HAVE OFFERED SUBSTANTIAL REASONS FOR GRANTING THE WRIT.

This case presents two very important questions of law which this Court has not decided but should decide. A

3. The "negotiations" with the Plaintiffs, to the extent that they occurred, were mandated by the Justice Department's regulations requiring the City to receive input from interested parties regarding voting changes. (See 28 C.F.R. § 51.26[e], formerly 28 C.F.R. § 51.11[b][7]. Regarding the "escalation clause," Mr. Korbel testified that was something he negotiated with the Justice Department. (TR. VII-119-120.)

third question, perhaps slightly less important, relating to the award of attorneys' fees is sufficiently troubling for the lower courts and they clearly need further guidance.

A. The Catalyst Question—What Is The Evidentiary Standard?

Defendants agree with Plaintiffs' statement that the question of whether or not the Plaintiffs' litigation was a "substantial factor or a significant catalyst" involved in motivating the City to accept single-member districts is one of fact and is subject to Rule 52(a)'s clearly erroneous standard. (Brief at 16-17.)

Yet the catalyst question is complicated because, as the District Court found, "All parties agree that the immediate cause of the City's changing the method of selecting City Council members was the Department of Justice's objection to the annexations and blocking the bond election." (648 F.Supp. at 557; App. A, p. 44a.) However, the Court of Appeals concluded that this factor did not vitiate the finding that the Plaintiffs were also a catalyst to the City, observing that it was not "the Plaintiffs' burden . . . to prove that the litigation was the only causative factor in the Defendants' conduct. This is not so. The 'substantial factor' or 'significant catalyst' test does not require such exclusivity." (831 F.2d at 580, App. C, p. 105a.)

If the Court of Appeals is correct that there can be multiple catalysts, the question then is what evidence supports the District Court's finding that the Plaintiffs moved the City to single-member districts. This Court should address these evidentiary requirements. The basis for the District Court's finding that *Mann* was a catalyst to the City is very limited, consisting of the testimony of some

of the Plaintiffs and their attorneys, and two expert witnesses. None of this evidence was competent, as defined by Rule 602 of the Federal Rules of Evidence, which provides: "a witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter." None of Plaintiffs' witnesses demonstrated any personal knowledge of what motivated the City. Under *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), there must be "two permissible views of the evidence" before the fact finder's choice cannot be clearly erroneous. To accept incompetent evidence and to disregard competent evidence to the contrary must be error and this Court should clarify that such a logical exception to *Anderson* exists.

The City's officials who had personal knowledge of the reasons for the City's actions testified that the Plaintiffs' action had no effect and that the Justice Department was the sole catalyst in their decision to accept single-member districts. They did not concede, as Plaintiffs assert (Brief at 18-19), that Plaintiffs and their litigation played a role in achieving the districts. Plaintiffs selectively quote testimony out of context to the point of distortion.[4]

The remaining proof cited is not competent under Rule 602. Timothy Cooper never addressed the catalyst issue. It is conceded the Plaintiffs were pleased with the result that the City went to single-districts. However, the cause, not the result, is the issue. Plaintiff Ben Reyes' testimony

4. The minuscule excerpts are better read in context and the pertinent testimony of Mayor Hofheinz, Mayor McConn, and Robert Collie are reproduced in Appendix I. It is clear that Hofheinz referred to the lawsuit in a political context. McConn was discussing the suit's effect on the Justice Department. Collie never expressed concern about the Plaintiffs' suit and never said what the District Court implied.

is self-serving and without any basis in personal knowledge, because he was not in City government until after the advent of single-member districts. Moreover, neither Mr. Dipple nor Mr. Garza revealed any personal knowledge as a basis for their conclusions. Finally, the fact that a Senior Assistant City Attorney agreed to settle a case is in no way probative of his views on the catalyst question.[5] (See Brief at 18-20.)

Thus, the evidence does not present two permissible views of the facts. As already noted (Petition at 12), the only basis the District Court offered for rejecting the testimony of the City's witnesses was the existence of the Hamilton & Rabinowitz contract and Mr. Korbel's speculative conclusion as to its purpose. (648 F.Supp. at 549; App. A, pp. 26a-27a.) Having already "spent more than $250,000 on outside experts and an additional half million dollars in staff time preparing for and trying the case" (Brief at 8), it is difficult to see the need to spend another $63,000 even if the City expected to retry *Mann*. The City hired several experts for work on the Clear Lake submission to the Justice Department. (TR. X-221; X-28-42.) Material from Hamilton-Rabinowitz, Inc. was included in that submission. (DX-2, see item 9-A-22.)

The City never suggested the latter contract was for the *Delaney* case, but merely offered evidence (DX-22; admitted at TR. VII-162-163) to impeach Mr. Korbel's testimony that *Mann* was the only outstanding litigation against the City at the time of that contract. It is strange

5. The City agrees that it is inappropriate to consider the attempted settlement. (Brief at 11, fn.1.) It was the Plaintiffs who raised the issue in the hearing but not without Defendants' objection to its relevancy. The District Court encouraged this inquiry, stating, "I'm curious myself," and overruled the City's objection. (TR. V-24-30.)

that Plaintiffs assert *Delaney* "had nothing to do with the at-large/single member district question." (Brief at 21.) It was brought under § 5 of the Voting Rights Act, complained about the Clear Lake annexations and alleged: "This system of councilmanic at-large elections has the effect of denial of fair representation of members of minority races on the City Council of Houston." (DX-22 at 6.) It further claimed the annexations diluted and debased the voting strength of blacks and Mexican-Americans.[6] (*Id.* at 8.)

B. Leroy II—What Are Special Circumstances?

This Court apparently has never decided what constitutes "special circumstances" under *Newman v. Piggie Park Enterprise, Inc.*, 390 U.S. 400, 402 (1968). Plaintiffs can point to no failure of the Justice Department to satisfy its statutory duty under § 5 of the Voting Rights Act. The *Leroy II* docket sheet conclusively shows no substantive action before the "cavalry" arrived. It is not that the Plaintiffs had to fold their tents and go, but that they should not be awarded fees for acting as "private attorneys general" when the United States is a party to the litigation. Whether and under what circumstances a private plaintiff can recover attorneys' fees in a Voting Rights case where the United States is also a party is a significant question this Court should address.

---

6. Plaintiffs obviously have confused *Delaney* with the Taxpayers' Political Action Committee's (TPAC) cause of action. The docket sheet shows that TPAC attempted to intervene in *Leroy II*, not the *Delaney* plaintiffs. Plaintiffs' exegesis of the *Delaney* docket sheet is wrong. (Brief at 21, fn. 2.) Entries after September, 1978, include docket call on November 6, 1978. In the Southern District of Texas, cases are set for trial at docket call. Nor does it reveal any abandonment until after the Justice Department mooted the litigation (The *Delaney* docket sheet is reproduced in Appendix II.)

C. The Attorneys' Fees Awarded As Affirmed.

Plaintiffs distort the testimony of Timothy Cooper in order to suggest that the City is "quibbling about $7.00 per hour." (Brief at 25.) Cooper testified that fees for Mr. Greene and Mr. Korbel should be in the range of $125 to $150 per hour. (TR. IX-58.) That does not support a rate that *averages* $157 per hour for all the lawyers, including the least experienced ones. Mr. Cooper also testified that while overall the total hours seemed reasonable, a 10 to 20% reduction was appropriate for poor record-keeping and probable duplication. (TR. IX-67-68.) The Court of Appeals apparently agreed. (*Cf.* Brief at 26.)

While Plaintiffs stress that the District Court found their time-records adequate (Brief at 27), the Court of Appeals termed them "incomplete." (831 F.2d at 586, App. C, p. 120a.) Despite their rhetoric in defense of the record-keeping, Plaintiffs apparently agree with the appellate court's characterization because they did not file a cross-petition challenging that action. Defendants are not complaining that the hours claimed should have been discounted further, but that the Court of Appeals should have reduced the excessive hourly rate, as a separate matter from the poor record-keeping. The most glaring result of this failure is the Court of Appeals awarded $174 per hour to a lawyer at Hogan & Hartson with one year's experience. (PX-13; *cf.* the court's award in *Vaughans v. Board of Education of Prince George's County,* 598 F.Supp. 1263 [D. Md. 1984].)

Respectfully submitted,

ROBERT J. COLLINS
Senior Assistant City Attorney

JOHN E. FISHER
Senior Assistant City Attorney

P. O. Box 1562
Houston, Texas 77251-1562
(713) 247-2000

Attorneys for Petitioners

APPENDIX I

EXCERPTS OF TESTIMONY

[8-130]

HOFHEINZ — CROSS

councilmen weren't?

THE WITNESS: Some were, some weren't.

THE COURT: Right. But you didn't have a majority?

THE WITNESS: Did not have a majority.

THE COURT: And a lawsuit acts sometimes to jog them along, is that not true? And specifically, in this case, is that what you're saying, kind of put a little—

THE WITNESS: Specifically, what I'm saying is that the lawsuit was part of an overall political atmosphere that was being created about this; and in that sense—in the sense of bringing this as a political issue to the minds of the people, I think the lawsuit played a role; but as far as — Like I say, if they're to be compensated for legal fees for that, I know a lot of other people who are also involved in the same effort in different ways.

THE COURT: Other attorneys?

THE WITNESS: Yes. I'm sure quite a few attorneys supported me and made speeches on this issue and did things that accomplished the same result.

THE COURT: Now, the Clear Lake —

THE WITNESS: Clearly, the City Attorney who just preceded me, he was in favor of this also.

THE COURT: And who was that?

* * *

line 8, the question is, "what I am saying is the overall deal for all litigation was for single member districts." Would you read your answer?

A. "In those two cases, yes."

Q. The next question beginning at line 11 is, "Mayor Hofheinz, it is my understanding it is your testimony that this lawsuit, like a number of other things, were all factors in the determination that the city go to single member districts." Would you read your answer?

A. "Well, I want to put emphasis on the same phrase that I'll use: There were many, many influences. Certainly, this lawsuit was one of them."

Q. Thank you.

MR. GREENE: No further questions, Your Honor.

THE COURT: Fine.

Mr. Fisher?

MR. FISHER: I would ask, Your Honor, for him to go ahead and put in the next question and answer, for whatever it's worth.

THE COURT: Certainly for completeness — If that's what your position is — under the Federal rules.

MR. FISHER: Yes.

THE COURT: And, lawyers, you look at it. It's page what now?

MR. FISHER: Again, page 47 beginning at line 20,

which is the next question Mr. Greene asked.

FURTHER REDIRECT EXAMINATION

BY MR. FISHER:

Q. "As a matter of fact, the reason the City went to single member districts was just — " It says of in my copy "— A Charter Revision Election, wasn't it?" And what was your answer?

A. "I think it was because the Justice Department made us go to that election and made us go, but I wasn't the mayor at this time."

Q. So, you were testifying as an observer of a political scene or as mayor when the movement occurred?

A. Well, with regard to the ultimate decision of the Justice Department, I was a mere observer. As regards to the politics of the 1970's, I was a participant. My comment about the lawsuit that Mr. Greene asked me to repeat from my deposition a moment ago goes to that idea that there was — that there was a political atmosphere that was created in the 1970's in Houston for single member districts; and that this lawsuit was a part of that political atmosphere; but it was just a part; and it was not the proximate cause of the City's decision to go to single member districts.

MR. FISHER: That's all I have, Your Honor.

MR. GREENE: Nothing.

* * *

do know that Dallas was having a similar problem and that cities all over the state and all over the country were having similar problems. The City of Port Arthur was involved in that, may still be. Dallas was having serious problems that they got rectified, I'm not sure whether right before or right after ours; but I don't think Houston was singled out. It was happening all over the country.

THE COURT: There was litigation pending in Dallas too, was there not, at that time?

THE WITNESS: I'm sorry?

THE COURT: Litigation pending?

THE WITNESS: Yes, yes.

THE COURT: Was there litigation pending in Port Arthur?

THE WITNESS: I don't know.

THE COURT: Based on — You've been a politician for many years. How do you get the attention of somebody like the Department of Justice or the Government? Does it help to file a lawsuit or does it not help?

THE WITNESS: Well, I guess it helps to file a lawsuit because they have to pay attention to the lawsuit; but, you know, what sticks in the back of my mind — and maybe it's not relevant — but the plaintiffs had lost that lawsuit, at least, at one level; and having

been through a lawsuit myself recently, lost it at the first level, second level, and third level. So, I don't — I don't know that had any effect on the final 9/5 plan or not because —

THE COURT: If they weren't around — the plaintiffs weren't around pushing it with their litigation, filing objections to the preclearance in Clear Lake, we may not have an effect, I gather, is that what you're telling me?

THE WITNESS: No, I don't think I'm saying that. It probably had some effect. But there's no — well, I think — and you can certainly correct me if I'm wrong. But there was a Voting Rights Act that the Federal Government decided that, perhaps, we had violated; and, perhaps, we did.

THE COURT: Who would suggest that?

THE WITNESS: The Federal Government.

THE COURT: And you don't know what role the plaintiffs and their lawyers played in convincing, —

THE WITNESS: No.

THE COURT: — If at all, the Government that you were violating that?

THE WITNESS: No, I really don't.

THE COURT: If they did play a role in convincing the Department of Justice that you were violating that

and then the Department of Justice acts, would you admit then that the plaintiffs played a role — the plaintiffs' lawyers played a role in getting to — getting the change accomplished?

I know you wanted it all along; but you're one person, the Mayor; and that's most important; but you're one person.

THE WITNESS: Right.

THE COURT: If that happened, would they not have played a role in getting the change accomplished?

THE WITNESS: Well, you know, if they brought it about, well, then, they would have played a role. How big a role, I just couldn't begin to answer.

THE COURT: Mr. Fisher.

MR. FISHER: I have nothing further, Your Honor.

THE COURT: Mr. Korbel.

MR. KORBEL: Nothing further, Your Honor.

THE COURT: Fine.

Is there any objection to Mayor McConn being permanently excused, Mr. Korbel?

MR. KORBEL: None, Your Honor.

THE COURT: Fine.

You may step down. Thank you, sir.

THE WITNESS: Thank you, Your Honor.

THE COURT: Mr. Fisher, call your next witness

* * *

made, our contact — I was looking to the Department of Justice because they were the ones that had to preclear it and not the private parties.

THE COURT: Well, now, they told — didn't the Department of Justice tell you in the letter, let's see, that whatever they did would not preclude —

THE WITNESS: — Private litigants.

THE COURT: Yeah.

THE WITNESS: Sure. And —

THE COURT: And whatever that exhibit number is, it's on the second page. I think it's almost at the end.

THE WITNESS: Right. That's known. And I think my attitude was that we had faced them in the *Mann* lawsuit; and they will be back, perhaps, you know, if the Department of Justice were to preclear us; and we would have to face it, you know, in the voting rights context; but that was — we'd do that when the time came. The hurdle we had to face at that time was with the Department of Justice. That was the way that I thought about it.

THE COURT: And the letter from the Department of Justice telling you whatever we're doing will not preclude the filing of — well, the further litigation or filing or whatever — however they put it — that didn't affect you. You didn't feel that you had to get by them

in order to avoid future litigation, and that was not a motive for you to talk to these people who were plaintiffs in the litigation. That's two questions.

THE WITNESS: We came and talked — they came and talked — well, we filed — we talked to them in part, I guess, after we made our submission in February of '79 because in the — Mr. Hunter and others were telling us they had comments from Dr. Murray. Dr. MacManus responded to those. We were getting, I guess, — I don't recall precisely, but I guess we were, you know, getting feedback from the Department of Justice that there were issues they wanted to talk about. Most of our public hearings and talking with the plaintiffs or their lawyers, as I recall, came after the objection letter was put into — came out in June of '79; and then we had to decide whether to file a lawsuit in the District Court in the District of Columbia, whether to negotiate with the Department of Justice. We had some hearings to get people's input; and, as I recall, we were encouraged to do that by the Department of Justice, see if people were in favor of 14/4, 24/0, you know, whatever the plans were; and it was mainly in those instances that I recall talking to any of the parties who happened to be plaintiffs in the litigation as opposed to talking to them as plaintiffs or as lawyers for the plaintiffs in the

lawsuit. They were at that time interested citizens' groups or individuals who were commenting after the objection.

THE COURT: How do you separate the two? If they were — you know, if they were so interested and if you look at the lineup of the plaintiffs, — and it's quite a cross-section — how do you separate the two? How do you know that they're speaking as plaintiffs in the lawsuit that's still pending as opposed to interested constituents, that is, they'll negotiate with you; and seemingly, if they're in litigation, they should be following — I don't know, whatever they're doing, as far as their attorney's advice; but if they're unable to resolve this, they still have this lawsuit hanging back there where they can resolve it. How do you differentiate between the two, where the plaintiff talks to you, Ben Reyes — and he, obviously, was a very — played a very significant role in your negotiations, is that not so or no? I don't know.

THE WITNESS: Well, the context in which we had these discussions would usually be that the City Council had called a public hearing or it may have been that — you know, City Council has what they call a time on Wednesday mornings in which individuals can come and make presentations to Council; and when I would talk to — if

my recollection's right, when I talked to Mr. Reyes or I'd see some of the plaintiffs, it would be before one of those public sessions. They may call afterwards, but it was — they were political constituents in the context of those public hearings as far as I was concerned as opposed to plaintiffs in the lawsuit. I don't recall talking to them about a particular lawsuit as much as a plan they might have.

THE COURT: What they were seeking to do is what they were seeking to accomplish in their litigation, isn't that so?

THE WITNESS: But in the political spectrum. I mean, —

THE COURT: But if they failed in the political spectrum, they could always drop back and punt in their case.

THE WITNESS: My thought was always if we succeeded with the Department of Justice in their review, we'd prevail in the courthouse as well.

THE COURT: And in order to get past the Department of Justice, did you consider that the Department of Justice was considering this litigation.

THE WITNESS: I considered it more an administrative proceeding which we had to make the submission and get their approval as opposed to —

APPENDIX II

DOCKET SHEET OF

MARVIN DELANEY, ET AL.

v.

CITY OF HOUSTON, ET AL.

CIVIL ACTION NO. H-77-1426

BEFORE WOODROW SEALS, Judge

PLAINTIFFS—

1. MARVIN DELANEY
2. AL JOE GREEN
3. BURNELL A. VAUGHAN
4. GLORIA B. MARTINEZ
5. ALFONSO G. RODRIGUEZ
6. WILLIAM E. SCHWEINLE, JR.
   and
7. SUSAN R. ALLISON

DEFENDANTS—

1. CITY OF HOUSTON, TEXAS
2. FRED HOFHEINZ
3. LARRY McKASKLE
4. JUDSON W. ROBINSON, JR.
5. LOUIS MACEY
6. HOMER L. FORD
7. FRANK O. MANCUSO
8. JIM WESTMORELAND
9. FRANK E. MANN and
10. JOHNNY GOYEN

CAUSE — Pltf's voting rights are diluted under Voting Rights Act; 42 USC 1973;

ATTORNEYS—

DAVID F. WEBB
Leonard, Koehn, Rose & Webb
6750 West Loop South, Suite 150
Bellaire, Texas 77401
661-3488
For Plaintiffs

JOHN R. WHITTINGTON, JR.
Asst. City Attorney
Box 1562
Houston, Tx 77001
222-5151
For Defendants

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
8-26-77	1	Pltfs' original complaint filed. (1) Summons Issued.
8-26-77	2	(WS) MEMO & ORDER denying TRO without prejudice to reconsideration if counsel meet certain conditions, fld a/n (Plf to serve Def Atty)
8-26-77	3	Defs' MOTION to Dismiss, fld (by lv of WS)
8-26-77 NM		*(WS) Order in re Hearing on TRO.* Entered. Appearing: David Webb for Plf Wm. E. Schweinle, Jr. Plf. For Def.: John R. Whittington, Jr. Charles M. Williams, Edw. Cazares. Statement by Webb and Whittington. Court denies TRO—does not meet prerequisites. Defs' Motion to Dismiss will not be entertained at this time. Plf will file a brief in opposition to motion to dismiss in 20 days.
8-26-77	4	Plf's PROPOSED FINDINGS re granting TRO, fld.
9- 1-77	5	Return of Summons/fld. Executed 8-26-77 on Mayor Fred Hofheinz, fld.
9-19-77	6	(WS) ORDER denying TRO, fld (Includes Court's findings) Defs are given statutory time to file Answer to complaint and plf a reasonable time to respond to Def's Motion to Dismiss) a/n

DATE	NR.	PROCEEDINGS
9-15-77	7	DEFTS' ORIGINAL ANSWER, fld.
9-30-77	8	Deft's Notice of Intention to take Deposition of Vicky Ryan on Oct. 12, 1977, fld.
10-21-77	9	Certificate of Non-Attendance for the Oral Deposition of Vicky Ryan, fld.
1- 9-78	10	DEPOSITION OF SUSAN R. ALLISON, fld.
1- 9-78	11	Certification of Questions DEPOSITION OF SUSAN R. ALLISON, fld.
1- 9-78	12	DEPOSITION OF BURNELL A. VAUGHAN, fld.
1- 9-78	13	Certification of Questions DEPOSITION OF BURNELL A. VAUGHAN, fld.
1- 9-78	14	DEPOSITION OF MARVIN C. DELANEY, fld.
1- 9-78	15	Certification of Questions DEPOSITION OF MARIN C. DELANEY, fld.
1- 9-78	16	DEPOSITION OF AL JOSEPH GREEN, JR., fld.
1- 9-78	17	DEPOSITION OF WILLIAM E. SCHEINLE, JR., fld.
1- 9-78	18	DEPOSITION OF GLORIA B. MARTINEZ, fld.
1- 9-78	19	DEPOSITION OF ALFONSO G. RODRIGUEZ, fld.

DATE	NR.	PROCEEDINGS
5- 1-78	20	(WS) DCO for July 5, '78, fld & Iss. (NP. 5-26, M. 5-26, PTO 6-23).
6-14-78	21	(NWB) MEMO & ORDER (entered at motion conference), fld. 1. Plf will file response to Motion to Dismiss o/b July 7, '78; def will respond by July 28, '78.
6-14-78		(NWB) MEMO & ORDER (continued) 2. Plf's motion for leave to amend is denied (at this time) [Def City withdraws its former position that it is not covered by the Voting Rights Act & recognizes the effect of U.S. v. Board of Commissioners of Sheffield, Alabama, 98 S.Ct. 965 (1978).]
6-27-78	22	(WS) DCO for Nov. 6, '78, fld & Iss. (NP. 6-5, M. 8-7, PTO 10-16)
7- 6-78	23	Ptlfs' RESPONSE to Defts' Motion to Dismiss and Pltfs' Motion to Strike Defts' Motion to Dismiss, fld.
8- 8-78	24	MOTION to Extend time to answer Pltf's reply to Defts' Motion to Dismiss with ORDER (WS) thereon granting same to Sept. 27, '78, fld. a/n
9-29-78	25	Defts' MEMORANDUM Attendant to Ptlfs' Motion to File a First Amended Complaint, fld.

DATE	NR.	PROCEEDINGS
11- 6-78		(WS) At docket call, case is passed to Mar./Apr.
11- 6-78	26	(WS) DCO for MARCH 5, '79, fld & Iss. (NP. na, M. na, PTO 2-16)
2-14-79	27	(WS) ORDER, that the Docket Control Order issued on 11-6-79, be vacated and hearings on any and all motions presently before this court be suspended until a Response has been received from the Dept. of Justice concerning the annexations challenged in this matter, filed. sv Parties ntfd. dd 2-15-79
5-24-79		TRANSFERRED pursuant to letter of RGG dtd May 12, 1979, to docket of Judge GEORGE E. CIRE effective June 1, 1979, Parties ntfd, sv